

LIBRARY
SUPREME COURT OF

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~832~~ 31

WYANDOTTE TRANSPORTATION COMPANY,
ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 7, 1966
CERTIORARI GRANTED FEBRUARY 13, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 838

WYANDOTTE TRANSPORTATION COMPANY,
ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Eastern District of Louisiana, Baton Rouge Division		
Docket Entries in No. 667	3	3
Docket Entries in No. 668	5	5
Libel and complaint for a declaratory judgment in No. 667	15	12
Exhibit A—Letter from Edward B. Jennings, Colonel, CE, District Engineer to Cargo Carriers, Inc., dated April 12, 1962	23	18
Libel in No. 668	23c	20
Motion of libelant to order sale of chlorine and containers in No. 668	36	29
Statement of respondent Union Carbide Corp. relative to libelant's motion for sale in No. 668	38	30
Order of confirmation of sale dated March 1, 1963 in No. 668	39	31

Original Print

Record from the United States District Court for the Eastern District of Louisiana, Baton Rouge Division—Continued		
Order amending order of March 1, 1963 in No. 668	40	32
Motion of respondent Wyandotte Transportation Co. to dismiss and alternative motion for summary judgment in No. 668	41	32
Exhibit A—Note re	42	33
Exhibit B—Affidavit of William R. Day, Secretary and Legal Director, Wyandotte Transportation Company sworn to March 18, 1963	43	33
Exhibit C—Letter from L. A. Thompson, Jr., Fleet Engineer, Wyandotte Transportation Company to Colonel James E. Welch, District Engineer, U.S. Corps of Engineers, Vicksburg District, dated November 14, 1961	46	36
Exhibit D—Letter from Colonel Warren S. Everett, District Engineer, U.S. Corps of Engineers, Vicksburg District to Wyandotte Transportation Company, dated September 25, 1962	54	42
Exceptions of respondent Union Barge Line Corporation in No. 668	56	43
Motion of respondent Union Barge Line Corporation for summary judgment in No. 668	57	44
Exhibit A—Note re	58	44
Exceptions of respondent Union Carbide Corporation to libel and, alternatively, motion to dismiss in No. 668	58	45
Motion of respondent Union Carbide Corporation for summary judgment in No. 668	59	46
Affidavit of D. E. Wittenberger sworn to April 2, 1963	60	46
Exhibit A—Chlorine-Caustic Soda Sales Agreement made July 13, 1960 between Wyandotte Chemicals Corporation and Union Carbide Chemicals Company	63	49
Exhibits B & C—Notes re	71	54

Record from the United States District Court for the Eastern District of Louisiana, Baton Rouge Division—Continued		
Affidavits and exhibits of libellant in answer to motions for summary judgment in No. 668	72	55
Answering affidavit of Colonel Warren S. Everett, District Engineer, United States Army Engineer District, Vicksburg, sworn to June 19, 1963 with attachments	72	55
Answering affidavit of Edward A. McDermott, Director of the Office of Emergency Planning, sworn to May 21, 1963	80	61
Affidavit of Joseph J. Carroll, diver, sworn to June 8, 1963	82	63
Affidavit of John B. Galletti, Jr., diver, sworn to June 8, 1963	84	65
Affidavit of Glenn R. Hilst, Vice President, Travelers Research Center	87	67
Affidavit of James W. Mannion, Jr., United States Army Chemical Research and Development Laboratories, sworn to June 10, 1963	90	69
Affidavit of E. D. Fales, with annexed copy of article, "Time Bombs in the Mississippi"	94	71
Affidavit of John R. Curry, sworn to April 25, 1963 (not including the annexed charts of the Mississippi River)	114	85
Affidavit of Captain J. J. Evans, Master of patrol boat M/V ORLEANS, sworn to May 14, 1963	114a	86
Affidavit of Thomas M. Irby, United States Army Engineer District, Vicksburg, sworn to May 14, 1963	116	88
Exhibit A—Radiogram	117	89
Exhibit B—Memorandum of telephone call	118	90
Affidavit of George J. Bodie, United States Coast Guard, sworn to May 27, 1963	118a	91
Letter of Chief of Engineers to Chairman, Senate Committee on Commerce, February 17, 1899	119	93
Record card of Chief of Engineers, May, 1899	124	96

Record from the United States District Court for the Eastern District of Louisiana, Baton Rouge Division—Continued		
Affidavits and exhibits of libelant in answer to motions for summary judgment in No. 668—Continued		
Record card of Secretary of War, July 11, 1901	127	98
Minutes and Memoranda of the Merchant Marine Council, 1943		
Minutes of May 17, 1943	130	101
Minutes of June 3, 1943	138	107
Memorandum June 3, 1943	150	116
Minutes of June 9, 1943	175	135
Motion of libelant for leave to amend libel to add Wyandotte Chemical Corporation as an additional party respondent in No. 668	187	144
Respondent's motion for summary judgment in No. 667	188	144
Minute entry entered January 8, 1964 consolidating cases, Nos. 667 and 668	189	145
Minute entry entered June 30, 1964 and Reasons in Nos. 667 and 668	190	146
Judgment entered June 30, 1964 in Nos. 667 and 668	192	147
Notice of appeal in Nos. 667 and 668	193	148
Appellant's designation of record (omitted in printing)	193	148
Counter-designation of record on behalf of Union Barge Line Corporation, Appellee (omitted in printing)	196	148
Counter-designation of record on behalf of Wyandotte Transportation Company, Appellee (omitted in printing)	197	148
Proceedings in the United States Court of Appeals for the Fifth Circuit	198	149

	Original	Print
Minute entry of argument and submission	198	149
Opinion, Gewin, J.	199	150
Judgment	221	166
Petition for rehearing en banc of appellees Wyandotte Transportation Company, Union Barge Line Corporation, Cargill, Inc., et al.	225	167
Petition for rehearing en banc of appellee, Union Carbide Corporation	242	170
Opinion on petitions for rehearing, per curiam	256	172
Judgment on petitions for rehearing	258	173
Clerk's certificate (omitted in printing)	259	174
Order allowing certiorari	260	174

[fol. 1]

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION**

Admiralty No. 667

UNITED STATES OF AMERICA, Libelant,

v.

CARGILL, INC., CARGO CARRIERS, INC., INLAND RIVERS TRANSPORTATION Co., JEFFERSONVILLE BOAT AND MACHINE Co., CONTINENTAL INSURANCE Co., TRAVELERS INSURANCE Co., Respondents.

Admiralty No. 668

UNITED STATES OF AMERICA, Libelant,

v.

**2,220,000 Pounds Chlorine Cargo ex Barge WYCHEM 112
and Containers, in rem,**

and

UNION CARBIDE CORPORATION, WYANDOTTE TRANSPORTATION COMPANY, and UNION BARGE LINE CORP., in personam.

[fol. 2]

APPEARANCES:

Louis C. LaCour, Esq., United States Attorney.

Walter F. Gemeinhardt, Esq., First Assistant United States Attorney.

Martin Jacobs, Esq., Attorney, Department of Justice, Attorneys for United States of America—Libelant-Appellant.

Messrs. Taylor, Porter, Brooks, Fuller & Phillips (By Tom F. Phillips, Esq.), Louisiana National Bank Building, Baton Rouge, Louisiana.

Messrs. Phelps, Dunbar, Marks, Claverie & Sims (By J. Barbee Winston, Esq.), Hibernia Building, New Orleans, Louisiana, Attorneys for Cargill, Inc., Inland Rivers Transportation Co., Jeffersonville Boat & Machine Co., Continental Insurance Co., and Travelers Insurance Company.

Messrs. Jones, Walker, Waechter, Poitevent, Carrere and Denegre (By George Denegre, Esq., and Robert B. Acomb, Jr., Esq.), 225 Baronne Street, New Orleans, Louisiana, Attorneys for Union Carbide Corp.

Messrs. Terriberry, Rault, Carroll, Yancey & Farrell (By Alfred M. Farrell, Jr., Esq.), 825 Whitney Building, New Orleans 12, Louisiana.

Messrs. McCreary, Hinslea & Ray (By Lucian Y. Ray, Esq.), 860 Union Commerce Building, Cleveland 14, Ohio, Attorneys for Wyandotte Transportation Corp.

Messrs. Lemle & Kelleher (By George B. Matthews, Esq.), 1836 National Bank of Commerce Building, New Orleans, Louisiana, Attorneys for Union Barge Line Corp.

[fol. 3]

NUMBER 667

DOCKET ENTRIES

- 12/21/62 Filing Libel and Issuing Six Citations in Personam (12/26/62)
- 1/25/63 Flg. MR on citation served 1/3/63 on Cargill, Inc. through Lloyd Graving; 1/3/63 on Cargo Carriers, Inc. through John Wilder; 1/3/63 on Inland Rivers Transportation Co. through John Wilder.
- 1/29/63 Flg. MR's on two citations served 1/16/63 on Travelers Insurance Co. and Continental Insurance Co. through the Secretary of State.
- 1/31/63 Flg. MR on citation served 1/25/63 on Jeffersonville Boat & Machine Co., Jackson's Landing, La., through J. R. Nelson, Asst. Secty. of State.
- 2/15/63 Flg. motion of respondents for extension of time to plead and ORDER EGW GRANTING all respondents extension up to and including 3/24/63. Issuing notice 2/19/63
- Nov. 1, 1963 Issg. Notice of Calling of Docket Nov. 15, 1963
- 11/13/63 Flg. motion by defendants, Cargill, Inc., Cargo Carriers, Inc., Inland Rivers Transportation Co., Jeffersonville Boat & Machine Co., Continental Insurance Co., Travelers Insurance Co. for summary judgment and memorandum.
- 11/15/63 ENTG. CALLING OF DOCKET — CASE PASSED

12/13/63 Flg. motion by respondents to stay proceedings pending determination by the Supreme Court of the case entitled United States of America vs Bethlehem Steel Corp., et al or until further order and ORDER EGW GRANTING. Issuing notice 12/17/63

1/ 8/64 Entg. ORDER EGW—this case consolidated with Adm. No. 668. FURTHER ORDERED that the Government have until 1/17/64 to file briefs and all respondents have additional 10 days thereafter to file reply briefs. FURTHER ORDERED that on 1/28/64 all motions pending to be submitted. Issuing notice 1/16/64

6/30/64 Entg. ORDER EGW—respondents' motions for summary judgment GRANTED and reasons assigned. Issuing notice and entg. 7/1/64

6/30/64 Flg. JUDGMENT EGW in favor of all respondents, and against plaintiff, dismissing suit at plaintiff's cost. Entg. & issuing notice 7/1/64

CLOSED CASE

9/22/64 Flg. plaintiff's NOTICE OF APPEAL from the [fol. 5] final judgment entered on 6/30/64. Issuing notice 9/24/64

10/29/64 Flg. libelant's motion for extension of time for docketing appeal and ORDER EGW GRANTING extension to December 22, 1964. Issuing notice and entg.

12/15/64 Record Forwarded to Court of Appeal

NUMBER 668

DOCKET ENTRIES

- 1/ 3/63 Filing Libel and Issuing Two Citations in Rem and Two Admiralty Warrants.
- 1/ 4/63 Issuing Three Citations in Personam
- 1/11/63 Flg. MR on 3 citations served 1/3/63 on Containers ex Barge Wychem #112 through John M. Able, 1/3/63 on 2,200,000 lbs. chlorine cargo ex barge Wychem #112 through Pat M. Brady, Asst. Plant Mgr., Wyandotte Chemical Corp., and 1/4/63 Wyandotte Transportation Co. through Scott Starkey, Mgr. of Wyandotte Chemicals Corp., South western Dist., Baton Rouge, La.
- 1/16/63 Flg. motion of libelant to order sale of chlorine and containers and notice of hearing 1/16/63 [fol. 6]
- 1/15/63 Flg. statement of respondent, Union Carbide Corporation, relative to the motion of the United States, libelant, for the sale of chlorine and containers that said respondent has no opposition to the relief sought by libelant.
- 1/16/63 Flg. ORDER GRANTING motion of libelant to sell chlorine and containers.
- 1/16/63 Flg. entry of appearance of proctors for respondent, Wyandotte Transportation Company.
- 1/16/63 Flg. Minute Entry of hearing on motion of libelant to order sale of chlorine & containers—GRANTED. FURTHER ORDERED that sale of these goods be advertised in a Baton Rouge, La. newspaper on 1/21/63 and 1/25/63 and in a New Orleans, La. newspaper on 1/23/63 and 1/28/63, aforementioned sale to take place at

the entrance to the U. S. Courthouse (post-office), Baton Rouge, La. on 1/30/63. Issuing notice 1/17/63

1/16/63 Flg. MR on 2 citations served 1/14/63 on Union Barge Lines Corporation through Ronald Roush, Port Engineer; 1/14/63 on Union Carbide Corporation through C.T. Corporation.

1/21/63 [fol. 7] Flg. motion of defendant, Union Carbide Corporation, for extension of time to plead and ORDER EGW GRANTING an additional 60 days time up to and including 4/5/63. Issuing notice 1/21/63.

1/24/63 Flg. motion of respondent, Union Barge Line Corporation, for extension of time to plead and ORDER EGW granting extension including 4/1/63. Issuing notice 1/25/63

1/24/63 Flg. motion of respondent, Wyandotte Transportation Co., for extension of time to plead and ORDER EGW granting extension including 4/5/63. Issuing notice 1/25/63

2/ 7/63 Flg. motion of libelant to order negotiated sale of chlorine and containers and exhibit and notice of hearing 2/7/63

2/ 7/63 Flg. Minute Entry of hearing on motion of libelant to order negotiated sale of chlorine and containers. GRANTED. Issuing notice 2/8/63

2/ 7/63 Flg. ORDER for sale of chlorine and containers to Stauffer Chemical Co. at a price of \$85,000, representing \$25,000 for the chlorine and \$60,000 for the containers, f.o.b. purchaser's barge at Geismar, La., within 60 days after confirmation. Containers to be delivered f.o.b. government barges, Port Allen, La., with the

- [fol. 8] free use of the government barges until 7/5/63, to be returned by that date to Port Allen Locks. Terms: \$8,500 cash, certified check, or cashier's check drawn on a local bank, balance to be paid upon confirmation of sale and within ten days of execution of sale. Issuing notice 2/8/63
- 2/20/63 Flg. motion of libelant for discovery against respondent, Union Barge Lines, affidavit attached, and notice of hearing 3/1/63
- 2/20/63 Flg. motion of libelant for discovery by respondent, Wyandotte Transportation Co., affidavit attached, and notice of hearing 3/1/63
- 2/27/63 Flg. petition of United States Marshal for confirmation of sale and notice of hearing 3/1/63
- 3/ 1/63 Minute Entry of hearing on petition of U.S. Marshal for confirmation of sale. GRANTED. FURTHER ORDERED that motions of libelant for discovery be GRANTED with provisions. Issuing notice 3/6/63
- 3/ 1/63 Flg. ORDER OF CONFIRMATION OF SALE of chlorine and containers for \$85,000 to Stauffer Chemical Co. to be deposited in the Registry of the Court by the Marshal after subtracting his costs and commission, said sum to be invested by the Clerk of Court in One-Year Treasury Bills of the USA pending final disposition of this cause. Issuing notice 3/6/63
- [fol. 9]
- 3/ 5/63 Flg. executed contract of sale.
- 3/ 5/63 Flg. Marshal's bill of costs in the amount of \$1,371.28.
- 3/11/63 Flg. notice to take deposition, by plaintiff.

3/13/63 Flg. MR on deposition subpoenae served on John Doe, unknown officer of Union Barge Lines Corp.; through R. Roush on 3/11/63

3/21/63 Flg. MR's on Admiralty Warrant of seizure served on Pat W. Brady, Wyandotte Chemical Corp., Geismar Works; further executed by monition appearing in Baton Rouge Morning Advocate of 1/18/63, announcing seizure of chlorine. MR on Admiralty Warrant of seizure served 1/3/63 on John M. Able; further executed by monition appearing in Baton Rouge Morning Advocate of 1/18/63; announcing seizure of containers, ex Barge Wychem #112. MR on order granting libelant permission to sell chlorine and containers, executed by causing to appear in New Orleans States Item 1/23/63 and 1/28/63 and Baton Rouge Morning Advocate 1/21/63 and 1/25/63 Notice of Sale. Further executed by public auction on 1/30/63, no sale, and writ returned unsatisfied.

[fol. 10]

3/28/63 Flg. MR on deposition subpoena served 3/22/63 on William Charles Smith.

4/ 3/63 Entg. ORDER EGW—Order of Confirmation of Sale, dated 3/1/63, amended by striking out paragraph numbered "3". Issuing notice 4/3/63

4/ 1/63 Flg. motion of respondent, Union Barge Line Corporation, for extension of time within which to comply with libelant's request for discovery and ORDER EGW (4/2/63) GRANTING extension up to and including 5/1/63. Issuing notice 4/3/63

- 4/ 1/63 Flg. motion to dismiss and alternatively for summary judgment by respondent, Wyandotte Transportation Co., and briefs in support thereof.
- 4/ 1/63 Flg. motion of respondent, Union Barge Line Corporation, to vacate notice to take deposition and memorandum in support.
- 4/ 1/63 Flg. exceptions of respondent, Union Barge Line Corporation, and brief in support.
- 4/ 1/63 Flg. motion of respondent, Union Barge Line Corporation, for summary judgment and brief in support thereof.
- 4/ 2/63 Entg. ORDER EGW—all pending motions herein, including motion of respondent, Wyandotte Transportation Co. to dismiss and alternatively for summary judgment, motion of respondent, Union Barge Line Corporation, to vacate notice to take deposition, exceptions of respondent, Union Barge Line Corporation, and motion of respondent, Union Barge Line Corporation, for summary judgment, set for HEARING 5/3/63. Issuing notice 4/3/63
- [fol. 11]
- 4/ 4/63 Flg. exceptions of respondent, Union Carbide Corp., and alternatively, motion to dismiss, memorandum. HEARING 5/3/63
- 4/ 4/63 Flg. motion of respondent, Union Carbide Corporation, for summary judgment and memorandum. HEARING 5/3/63
- 4/17/63 Entg. ORDER EGW—hearing on motions previously scheduled for 5/3/63 CONTINUED SUBJECT TO REASSIGNMENT. Issuing notice 4/18/63

8

- 4/29/63 Flg. motion of respondent, Union Barge Line Corp., for extension of time to reply to libelant's request for discovery and ORDER EGW (sgd. 5/2/63) Granting extension up to and including 6/1/63. Issuing notice 5/2/63
- 5/28/63 Flg. motion by respondent, Union Barge Line Corp. for extension of time and ORDER EGW that the time within which Union Barge Line Corp. is required to respond to the motion for production of documents by libelant is extended to 7/1/63. Issuing notice 5/29/63
- [fol. 12]
- 6/19/63 Flg. response by respondent, Union Barge Line Corp., to notice to admit filed by libelant.
- 6/21/63 Flg. reply by respondent, Union Carbide Corp. to request to admit.
- 6/17/63 Flg. stipulation that libelant shall have until 7/1/63 to file answering affidavits and brief in opposition to respondents exceptions, motions to dismiss, and motions for summary judgment. Respondents to have until 8/15/63 to file reply briefs.
- 7/ 1/63 Flg. admission of genuiness (sic) by respondent, Wyandotte Transportation Co.
- 7/ 9/63 Flg. motion by libelant for extension of time to file briefs.
- 7/ 9/63 Flg. stipulation between all parties that libelant shall have until 7/15/63 to file answering affidavits and briefs in opposition to respondents' exceptions, motions to dismiss and motions for summary judgment. Respondents to have until 9/6/63 to file reply briefs.

7/ 9/63 Flg. motion by libelant to continue hearing on motions of respondents for summary judgment until libelant is able to take depositions and [fol. 13] have discovery, memorandum, affidavit, and exhibits attached.

7/15/63 Flg. affidavits and exhibits of libelant in answer to motions for summary judgment.

7/16/63 Flg. motion by libelant for leave to amend libel to add Wyandotte Chemical Corp. as an additional party respondent and notice of hearing to be set by the Court.

7/31/63 Entg. ORDER EGW—all pending motions herein to be heard 10/28/63. Issuing notice 8/2/63

7/30/63 Flg. motion by all respondents for extension of time to file briefs and ORDER EGW GRANTING extension to 9/20/63. Issuing notice 7/30/63.

9/23/63 Flg. affidavit by George Denegre, attorney for respondent Union Carbide Corp., verifying copy of Bill of Lading.

10/23/63 Entg. ORDER EGW—hearing set for 10/28/63 CONTINUED TO BE RE-ASSIGNED. FURTHER ORDERED that all proceedings be STAYED pending the determination by the U. S. Supreme Court in USA vs Bethlehem Steel Corp., et al. Issuing notice 10/24/63

1/ 8/64 Entg. ORDER EGW—this case consolidated with Adm. No. 667. FURTHER ORDERED that the Government have until 1/17/64 to file [fol. 14] brief and all respondents have additional 10 days thereafter to file reply briefs. FURTHER ORDERED that on 1/28/64 all motions pending be SUBMITTED. Issuing notice 1/16/64

- 6/30/64 Entg. ORDER EGW—respondents' motions for summary judgment GRANTED and written reasons assigned. Issuing notice and entg. 7/1/64.
- 6/30/64 Flg. JUDGMENT EGW in favor of all respondents against plaintiff, dismissing suit at plaintiff's cost. Entg. & issuing notice 7/1/64

CLOSED CASE

- 9/22/64 Flg. plaintiff's NOTICE OF APPEAL from the final judgment entered on 6/30/64. Issuing notice 9/24/64
- 10/29/64 Flg. libelant's motion for extension of time for docketing appeal and ORDER EGW that extension be GRANTED to December 22, 1964. Issuing notice and entg. 11/2/64
- 12/15/64 Forwarding Record to Court of Appeals, Fifth Circuit

[fol. 15]

IN UNITED STATES DISTRICT COURT

Number 667

LIBEL AND COMPLAINT FOR A DECLARATORY JUDGMENT UNDER SUPREME ADMIRALTY RULE 59—Filed: December 21, 1962

The libel and complaint of the United States of America for a declaratory judgment under Supreme Court Admiralty Rule 59 in an action civil and maritime alleges upon information and belief as follows:

First: Libelant, the United States of America is a sovereign nation entitled to commence this action pursuant to the provisions of Title 28, United States Code, Section 1345, under which statute this Honorable Court is granted original jurisdiction of this cause of action, brought pursuant to the request of the U. S. District Engineer.

Second: This action arises under the provisions of Title 28, United States Code, Sections 2201 and 2202, and is proceeded with as provided in Rule 59 of the Supreme Court Admiralty Rules.

Third: Respondent, Cargill, Inc., is a corporation organized and existing under the laws of the State of Delaware with an office and place of business in this district at Jackson's Landing.

Fourth: Respondent, Cargo Carriers, Incorporated, is a corporation organized and existing under the laws of the State of Delaware with an office and place of business in [fol. 16] this district at Jackson's Landing.

Fifth: Respondent, Inland Rivers Transportation Company, is a corporation organized and existing under the laws of the State of Delaware with an office and place of business in this district at Jackson's Landing.

Sixth: Respondent, Jeffersonville Boat and Machine Company is a corporation organized and existing under the laws of the State of Delaware with an office and place of business in this district at Jackson's Landing.

Seyenth: Respondent, Continental Insurance Company is a corporation organized and existing under the laws of the State of New York, which is doing business within this district and subject to service as a foreign corporation.

Eighth: Respondent, Travelers Insurance Company is a corporation organized and existing under the laws of the State of Connecticut, which is doing business within this district and subject to service as a foreign corporation.

Ninth: The actual controversy between the parties concerns the ownership of and liability for two barges, the Barge L 1, owned by Cargo Carriers, Inc., and the Barge M 65, owned by Jeffersonville Boat and Machine Corp. The other parties are managers and charterers of the barges, and the marine underwriters, protection and indemnity and hull on the barges.

Tenth: The two barges M 65 and L 1, each 195 feet [fol. 17] by 35 feet by 12 feet, were moored by a tug, time-chartered to Cargo Carriers, Inc. at the Cargill fleet mooring at Jackson's Landing, also called Red Dog Landing, Mile 227.5 above Head of Passes, Baton Rouge, Louisiana, on March 30, 1961.

Eleventh: About 3:32 A.M., on March 31, 1961, the supertanker ESSO ZURICH, 625 feet long, 82.7 feet beam, 42.7 feet depth, 17,943 gross tons, bound upriver for Baton Rouge, in good visibility with shore lights clear ahead and astern, collided with and sank near Arlington Light, mile 224.1 Above Head of Passes, an unmanned and unlighted barge, which had been drifting in the channel. The pilot reported the incident on the voice radio to the barge fleet at Baton Rouge. Apparently two barges were missing, the L 1 and M 65. The bow lookout on the ESSO ZURICH had seen two unlighted barges, only one of which was hit.

Twelfth: On March 31, 1961, at 1:24 P.M., CST, Cargo Carriers, Inc. wired the District Engineer as follows:

This is to notify you that our barges L 1 and M 65 were sunk on March 31 at approximately Mile 223. Red Eye Crossing AHP Approximately 100 yard east of center of channel. L 1 has about 20 feet of port [fol. 18] forward corner extending above water.

At 3:07 P.M. on the same day the District Engineer replied, referring to the message and stating:

Advise your intentions as to disposition. Your responsibility to mark for day and night navigation.

Thirteenth: On April 2, 1961, Cargo Carriers, Inc. wired the District Engineer that the barges had been marked with three green oil drums welded together with five lanterns welded to the top, and that no salvage attempt would be made prior to April 3, a Monday.

Fourteenth: By a wire sent 1:56 P.M., CST, April 9, 1962, Inland Rivers Transportation Co. Minneapolis, to District Engineer, New Orleans stated:

We hereby abandon our barge designated as the L 1 Steel. Jumbo Barge 195 by 35 which sank on or about March 31, 1961 at about Mile 223.2 Mississippi River. Please acknowledge.

By wire sent 2:01 P.M., CST, April 9, 1962, Cargo Carriers, Incorporated, Minneapolis, to the District Engineer, stated:

We hereby abandon our barge designated as the M 65 Steel Jumbo Box Barge 195 by 35 which sank on or about March 31, 1961 at about Mile 223.2 Mississippi River. Please acknowledge.

[fol. 19] These wires of April 9, 1962 were followed by letters dated April 10, received April 13, 1962, which stated:

We do hereby declare our intention to abandon this vessel to the United States under provisions of Section 8 of the Rivers and Harbors Act.

Fifteenth: By a wire dated April 10, 1962, to Cargo Carriers, Inc. (similar wire to Inland Rivers Transportation Co.) the District Engineer replied:

Reurtel 9 April 1962. Government refuses acceptance abandonment your barge M 65 per discretion 33 USCA 414. Your responsibility to mark and light or remove. Letter follows.

Copy of the letter dated 12 April 1962 to Cargo Carriers, Inc. (similar letter to Inland Rivers Transportation Co.) is annexed as Exhibit A.

Sixteenth: Thereafter, on April 20, 1962, Inland Rivers Transportation Co., Cargill, Inc. and Cargo Carriers, Inc. at Baton Rouge, wired the District Engineer that;

Inasmuch as it is our position that tender of abandonment to you of said barges has been effected please advise that you accept abandonment and as the owner thereof, will provide such buoying and lights as you [fol. 20] deem necessary or desirable.

On the same day the District Engineer replied:

Reurtel 20 April 1962, Government reiterates refusal to accept abandonment or any responsibility for marking and lighting Barge L 1. You are advised to mark and light Barge L 1 pending your removal of same from navigable waters of United States . . .

Seventeenth: The dispute continued until a wire from Inland Rivers Transportation Co. to the District Engineer, dated April 26, 1962, was referred to the Department of Justice for litigation. This wire, prepared by counsel for Continental Insurance Co. stated:

We reiterate it is our position we no longer have any right title or interest in or to the said barges or the wrecks thereof such having been abandoned to you. It is further our position that it is your obligation if any there is to mark and light the vessels or the wrecks thereof and that any loss damage or injury caused by incidental to or connected with the vessels or wrecks thereof is your responsibility.

Eighteenth: Only one barge was located, which is believed to be the wreck of the L 1, which shows marks of a [fol. 21] collision, and is located in the Mississippi River at Red Eye Crossing, outside the sailing line, just below the surface between Dailey Chapel, East Baton Rouge Parish, and Lukeville, West Baton Rouge Parish, near the power line crossing, within this district.

Nineteenth: Respondent, Continental Insurance Company covered these barges under a standard type Inland

Vessels Protection and Indemnity form, which included, among others, coverage for:

Any attempted or actual raising, removal or destruction of the wreck of the insured vessel or the cargo thereof, or any neglect or failure to raise, remove or destroy the same.

Libelant seeks to enforce this coverage pursuant to the Louisiana District Action Statute, La. Rev. Stat. 1950, 22:655, as amended.

Twentieth: The aforesaid collision and wreck was not caused or contributed to by the fault or neglect of libelant or any person for whom libelant is responsible but was solely caused by the fault and neglect of respondents in the following respects, among others which will be shown at the trial.

1. The barges were unseaworthy.
2. The barges did not have proper lights or proper [fol. 22] standards on which to erect lights.
3. The barges did not have adequate mooring lines.
4. No watchmen were stationed to inspect the barges or their moorings.
5. The barges were negligently moored, negligently attended and permitted to break loose and drift down the river, unlighted and a menace to navigation.

Twenty-first: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, Libelant prays:

1. That process in due form of law issue against respondents, citing them to appear and answer the allegations of this libel.

2. That the court will be pleased to decree that the responsibility and liability of marking and removing the

wrecks remains with the respondents and cannot be shifted by them to the Government by virtue of Section 8, or any other section of the Rivers and Harbors Act.

3. That the court will be pleased to decree that the respondent underwriters are under their insurance policies, obligated to remove said wrecks, and,

4. That the court will grant such other relief as the [fol. 23] justice of the cause may require.

Louis C. LaCour, United States Attorney.

Thomas F. McGovern, Attorney, Admiralty & Shipping Section, Department of Justice, Washington 25, D.C.

EXHIBIT A TO LIBEL AND COMPLAINT

12 April 1962

LMNVE

Cargo Carriers, Inc.

200 Grain Exchange Building

Minneapolis 15, Minnesota

Gentlemen:

This letter will confirm telegram of 11 April wherein the United States declined to accept abandonment of your Barge M-65 which sank on or about 31 March 1961 in the Mississippi River, vicinity of Mile 223.2 Above Head of Passes.

Our files reflect that subsequent to the sinking, your insurance underwriters assumed responsibility for this barge, had the same marked and lighted, and proposed to have it raised and removed from the river. Under these circumstances, it is doubtful whether you have the right to abandon this barge, especially since it seems highly possible that your underwriters stand to lose a considerable amount of money as a result of the collision (sic) with [fol. 23a] the Esso ZURICH.

It is also our understanding that the Barge M-65 was libeled in Admiralty Case No. 5010 brought by Humble Oil in the United States District Court for the Eastern District of Louisiana, and will be involved in the Limitation of Liability proceeding filed by the M/V ISABEL S. GARRETT in the United States District Court for the Southern District of Texas, Houston Division.

A review of the pleadings filed in the suit brought by Humble reflects that the Barges L-1 and M-65 were negligently moored at Jackson Landing in Baton Rouge, Louisiana, by the M/V ISABEL S. GARRETT; were negligently permitted to get loose and float several miles without the knowledge of anyone; were negligently floating loose in the Mississippi River, unnavigated, unguided and without proper lights; and that both barges sank after colliding with the Esso ZURICH as a direct and proximate result of this negligence.

It is also noted that the M/V ISABEL S. GARRETT's owners, Bell Marine Service, charge that the Barges L-1 and M-65, the M/V ISABEL S. GARRETT, and the operation of the Jackson Landing were all under the supervision and control of Cargo Carriers, Inc. It is also noted that although you advised the Government in its letter of 14 April 1961 that Inland Rivers Transportation Company [fol. 23b] and Jeffersonville Boat and Machine Company were the owners of the Barge L-1 and the Barge M-65, respectively, the telegram giving notice of abandonment of both barges came from your offices in Minneapolis, Minnesota, rather than the offices of the two above-named companies in Chicago, Illinois, and Jeffersonville, Indiana.

The primary responsibility for marking and lighting and for removal of a sunken vessel is placed upon the owner thereof by virtue (sic) of the provisions of 33 U.S.C.A. 409 and related articles, and acceptance of this responsibility by the United States is discretionary rather than mandatory by reason of the provisions of 33 U.S.C.A. 414. In view of the fact that the Barge M-65 was sunk

as a result of the negligence of her owners and/or operators; is presently libeled by the owner of a vessel to which she caused damage; and is most probably owned or subject to salvage and/or subrogation claims by her insurance underwriters, the United States Government refuses to accept abandonment of the Barge M-65 and assumes no responsibility for removal of said barge or for marking and lighting pending removal. This office will, however, record and preserve your notice of abandonment for whatever purpose it may serve in the future.

Sincerely yours,

[fbl. 23c]

EDWARD B. JENNINGS
Colonel, CE
District Engineer

cc: Jeffersonville Boat & Machine
Co., Jeffersonville, Ind.

Commandant, 8th US Coast
Guard Dist, N.O., La.

Channel Patrol Sec. Oprns

IN UNITED STATES DISTRICT COURT

No. 668

LIBEL—Filed January 3, 1963

To the Honorable, the Judge of Said Court:

Comes now the United States of America by Louis C. LaCour, United States Attorney for the Eastern District of Louisiana, on direction of the Attorney General, and brings this libel against 2,220,000 pounds of chlorine cargo ex-Barge WYCHEM 112 and containers, *in rem*; and against Union Carbide Corporation, Wyandotte Transportation Company, and Union Barge Line Corp., respondents, *in personam*, in a cause civil and maritime of

nuisance, tort and salvage, and respectfully alleges upon information and belief as follows:

First: The United States of America is a sovereign which maintains, protects, and conserves the Mississippi River as a great national highway, the free navigation of [fol. 24] which is paramount as a great navigable channel of travel and of commerce; which by statute, 33 U.S.C. 10, is required to be and forever remain a public highway.

The national character and essential federal interest in this national artery of commerce was confirmed by reservations in the acts admitting the new states on this river, by the Louisiana Purchase, and by two wars; and from the earliest days Congress has continually appropriated funds for the improvement of navigation on this river and has appointed federal commissions to correct, permanently locate and deepen the channel and protect the banks of the Mississippi, to improve navigation, and to prevent destructive floods, and to promote and facilitate commerce, trade and postal service. The exact amount of federal property on the banks and levees in articulated mats, revetments, dikes, works, structures buoys, beacons, lights, landings, vessels, on the part of the river within thirty miles of this chlorine and downriver from its then location is incalculable but substantial in nature. In addition to its property interests, libelant as parens patriae and acting for the public health and welfare, has an interest in protecting its citizens, navigating and residing on and along the banks of said river, whether afloat or ashore, against death and injury by noxious and poisonous gases, which have been [fol. 25] deposited into the navigable channel of the river.

Second: The chlorine cargo ex-Barge WYCHEM 112 is presently in safe storage at the Wyandotte Chemicals Corp. Geismar Works at Ascension parish, Louisiana, within this district. The containers are presently stored at Port Allen, Louisiana, within this district.

Third: The said cargo of liquid chlorine belonged at the time of its loss and subsequently, to Union Carbide Cor-

poration, organized under the laws of the State of New York, and doing business within this district, with offices at 4833 Conti Street, New Orleans, Louisiana.

Fourth: The containers for the cargo are owned by Wyandotte Transportation Company, a wholly owned subsidiary of Wyandotte Chemicals Corp., organized under the laws of the State of Michigan, and doing business within this district with offices at 244 Peachtree Boulevard, Baton Rouge, Louisiana.

Fifth: The Union Barge Lines, Corp., organized under the laws of the State of Pennsylvania, and doing business within this district with offices at the Commerce Building, New Orleans, Louisiana, was the owner and operator of the towboat Eastern, official #271680, 155 feet long, 36 feet wide, 3,530 horsepower, 743 gross tons, built in 1956, which vessel was the towboat in charge of the Barge WYCHEM 112 when the barge sank.

[fol. 26] Sixth: The Barge WYCHEM 112 was a new barge on her maiden voyage. Built by Avondale Shipyard expressly for use as a liquid chlorine barge for Wyandotte Transportation Company, it was an open hopper type barge with rake ends, a low hatch coaming, a low deck housing in the middle, and inside the barge was all one big open hatch not compartmented. Four huge chlorine gas cylinders, each 75 feet long and 11 1/2 feet in diameter, were tiered two abreast inside the open hatch and were designed to be filled with liquid chlorine under pressure. The barge was unmanned and undecked and had no pumps or suction aboard to pump out the water which came into the open box.

On March 15-17, 1961, the tanks were filled with 555,000 pounds of chlorine gas each, at the Geismar Works of Wyandotte Chemicals Corp., and the Barge WYCHEM 112, owned by Wyandotte Transportation Company, a wholly owned subsidiary of Wyandotte Chemicals Corp. was taken in tow on March 21, 1961 by the towboat *East-*

ern, which was owned and operated by Union Barge Line Corp., under a contract of towage to deliver to Union Carbide Corporation at South Charleston, West Virginia. Whether the contract of towage was between Union Barge and Union Carbide, or between Union Barge and Wyandotte, libelant does not yet know, but was advised by Wyandotte that the cargo was owned by Union Carbide at the time of the loss.

[fol. 27] Seventh: The narrative of the pertinent facts as presently known to libelant is that during the first part of the tow, from Geismar, Louisiana, to Baton Rouge, Louisiana, the Barge WYCHEM 112 was in the fourth and last tier of the four tiers of barges of the tow, which was arranged five abreast in the first tier, four abreast in the second tier, four abreast in the third tier, and three abreast of the fourth tier, with the towboat *Eastern* pushing the middle one of the fourth tier. This arrangement kept the chlorine barge with its dangerous cargo near to and under easy observation from the towboat. About Baton Rouge, those in charge of the towboat *Eastern* rearranged the tow and placed the Barge WYCHEM 112 with its dangerous cargo in the first and foremost tier, being the lead barge on the port of left-hand side. This separated the barge with its dangerous cargo away from the towboat, but also moved it away from direct observation of the towboat's pilothouse and out where it would bear the brunt of the weather. Around 6:45 a.m., EST, on March 23, 1961, with weather and visibility good but with a strong current, the Barge WYCHEM 112 began to dive, putting her bow down and raising her stern up. The barge sank near Vidalia, Louisiana, at mile 353, above head of passes, Mississippi River. The sinking did not involve a collision, act of God, peril of the sea, storm, or any unusual weather and the [fol. 28] facts themselves speak of negligence by one or more of the respondents. The divers sent down as part of the recovery operation found the forward manhole cover not dogged down.

Eighth: After the sinking, the narrative facts were that the owners and operators of the barge and their underwriters made some effort in the fall of 1961 to locate and raise this inherently dangerous cargo and were assisted by the Navy, which flew electronic equipment over, by the Engineers who used sounding devices, and by a private firm using a magnetometer floated in a submarine. The magnetometer located two objects, either of which could have been the wreck, both under hard packed sand, and in November 1961, the Wyandotte Company notified the Engineers that further efforts to locate and salvage the wreck would be unsuccessful.

Thereafter the extent and potential danger of this chlorine to the people, animals and river property in that area received technical study from the Government and from representatives of the Chlorine Institute and from the Wyandotte Company, which have at all times cooperated and assisted in the chemical hazard side of the problem. No one knew which wreck had the chlorine; no one knew how long the tanks or gaskets and fittings would take to corrode through under the mud; and there was a division [fol. 29] of expert opinion on whether the mud cap would contain any small leak around the metal, transforming the chlorine into hydrochloric acid and thereby enlarging the hole.

After extensive discussions, the Chlorine Institute met with the Coast Guard, Public Health Service and Corps of Engineers at Washington on July 10, 1962, and issued opinions and recommendations dedicated solely to the technical question involved. Among those technical opinions were that the likely places to leak were at the safety valve from the outside, and at the bolts and gaskets of the angle valves or of the safety valves; that if a leak did start it would not long remain a small one because of the corrosive effect; that if a leak did start chlorine gas would come to the river surface and enter the atmosphere; that there is no way to know when a leak will occur—might be from

two to ten years—but so long as the barge remained on the bottom it was a potential hazard; and recommended among others that the barge, or the individual tanks of the barge, should be raised as soon as practical under controlled conditions; that the Government should do it and that the Institute would assist technically but not as to the salvage part of the work. At a further meeting on August 7, 1962, there was a dispute as to whether the legal responsibility [fol. 30] to act was with the Wyandotte Chemicals Corp. or with the Government, which was unresolved. A demand to remove was rejected by Wyandotte.

After mature consideration the Public Health Service advised the Office of Emergency Planning that in its opinion the chlorine constituted a hazard to public health and safety. On September 6, 1962 the Office of Emergency Planning convened a meeting in Washington of the interested Federal Agencies and on September 11, 1962, convened a meeting with public and private interests at Vicksburg, Mississippi. The Vicksburg meeting concluded with the Government promised the help of Wyandotte Chemicals Corp. and the Chlorine Institute. By this time the public health problem had been appraised as involving possible casualties of 40,000 to 50,000 people with 10,000 to 25,000 fatalities; and the casualty was proclaimed a major disaster under 42 U.S.C. 1855, 1855a-g, by the President on October 10, 1962 for Mississippi and November 5, 1962 for Louisiana, and by the Governor of Mississippi on October 11, 1962.

Ninth: The wreck was located; the tanks were removed with extreme care against any puncture and with a mobilization of the civil defense, public health and state authorities under the Disaster Relief Act, Public Law 875, 81st Cong.; 42 U.S.C. 1855, 1855a-g, during the period October [fol. 31] 24, 26, November 2, 5, 1962, and the last tank was delivered to the Geismar plant of Wyandotte on November 13, 1962, and purged on December 2, 1962.

Tenth: Said Union Carbide Corporation collected the value of its cargo from its cargo underwriters, who refused

to accept the abandonment of the cargo, and accordingly left Union Carbide Corporation with unimpaired legal title to this liquid chlorine.

Eleventh: Libelant is not presently advised as to the exact relationship between the shippers (Wyandotte Chemicals Corp.); the carriers (Wyandotte Transportation Company and Union Barge Lines, Corp.); and the consignee (Union Carbide Corporation), but attempted to keep all interests informed and on notice as to the nuisance abatement by a wire of 16 October 1962, to the General Counsel of Union Carbide Corporation, repeated to their underwriters, which wire was in turn sent to Wyandotte Chemicals Corp. by letter of 23 October 1962.

Twelfth: Each tank of chlorine contained 275 tons; more chlorine than the Germans used in their first gas attack at Ypres in April 1915 when 168 tons caused 15,000 casualties and 5,000 deaths and a single small leak in the fittings or gaskets could rapidly corrode and cascade into an imminent peril, all constituting an inherently dangerous substance and a nuisance per se, which when not removed by its [fol. 32] owners, demanded prompt removal by libelant as a public authority and conservator of the Mississippi River and as the only governmental organization capable of so large and federal a project, thus giving rise to a lien against any property of value annexed to the nuisance and to a charge and claim for reimbursement against those responsible for leaving such an inherently dangerous substance in the public highway.

Thirteenth: The aforesaid loss was not occasioned by the fault or neglect on the part of the libelant, United States of America, but was solely caused by the fault and neglect of respondents, in the following respects, among others, which will be shown at the trial of this case:

1. The Barge WYCHEM 112 was unseaworthy.
2. The Barge WYCHEM 112 was improperly designed.

3. In view of the dangerous cargo for which the Barge WYCHEM 112 was designed, she was not equipped with a deck which would have prevented her from sinking whenever water came over her bow.
4. The chlorine tanks were not designed with adequate protection against injury by collision and sinking and were not protected by adequate collision and leakage bulkheads.
5. The Barge was not manned by a watchman or by [fol. 33] other person to protect her against the ordinary perils of the river.
6. Those in charge of the Barge did not take frequent soundings by lead line or pole to determine if she was shipping water.
7. Those in charge of the Barge did not make frequent inspections to determine her condition.
8. Those in charge of the Barge failed to maintain an adequate and vigilant lookout.
9. There was no lookout on the bow of the tow.
10. Those in charge of the Barge were not warned of her inherently dangerous condition and that they should take special care of her as if she were an explosive barge.
11. The Barge did not have its hatch cover fastened when delivered at the dock to the towboat on its maiden voyage.
12. The Barge did not have its hatch cover fastened when moved to the head or weather side of the tow.
13. The open barge was moved from a position of safety to a position of danger as the lead port barge in the tow.
14. The Barge was not equipped with pumps or siphons to handle the water which would come over the open hatch.

[fol. 34] 15. In view of the known deadly and dangerous nature of her cargo, the Barge was loaded with and was permitted to carry an excessive amount of chlorine exposed to a single hazard.

- ♦ 16. The said chlorine cargo in the position where it was left constituted a nuisance per se and a continuing danger to those navigating the river, to those living near the river, and to all their livestock and other property, which would have been destroyed by the chlorine gas which would have escaped in the fullness of time.

Fourteenth: The damages and expenses of libellant in abating this nuisance and in salvaging this inherently dangerous cargo amount to approximately \$3,081,000.00 as nearly as may presently be estimated. Of this amount approximately \$1,565,000.00 was engineering expense, and \$1,516,000 public health and safety expense, including necessary precautions against a possible rupture during the salvage operations; no part of which has been paid although duly demanded.

Fifteenth: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays:

- (1) That process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue in rem against the said cargo and containers and in personam against the said Union Carbide Corporation, Wyandotte Transportation Company, and Union Barge Lines, Corp., citing them and each of them to appear and answer all and singular the allegations herein;
- (2) That the Court may be pleased to declare and decree that libellant is entitled to its damages as proceeded on;

- (3) That the Court condemn the said cargo of chlorine with its tanks to be sold for such damages and the costs of this action;
- (4) That the Court condemn respondents for such damages and costs, or such of them as the Court may find liable;
- (5) That the Court order an account taken of such damages by a commissioner; and
- (6) That libelant have such other relief as the nature of the case may require.

Louis C. LaCour, United States Attorney.

Duly sworn to by Thomas F. McGovern, jurat omitted in printing.

[fol. 36]

IN UNITED STATES DISTRICT COURT

No. 668

MOTION OF LIBELANT TO ORDER SALE OF CHLORINE AND
CONTAINERS—Filed January 16, 1963

Comes now the libelant the United States of America and moves this Honorable Court as follows:

First: On January 3, 1963, the Marshal of this Court seized the chlorine and its containers libeled in the above [fol. 37] case. At present the chlorine is being stored in the Geismar Works of the Wyandotte Chemical Corporation at a cost of \$55.50 per day. The containers are being stored separately by the United States Army Corps of Engineers at Port Allen Locks at great inconvenience and at considerable cost to the Corps of Engineers.

Second: The retail value of the chlorine is approximately \$60.00 per ton or a total of \$66,600.00. At auction the chlorine should bring a price of at least \$30,000.00. The replacement cost of all four containers is approximately \$100,000.00. They should bring at least \$80,000.00 at auction.

Wherefore, libelant prays that in order to save storage charges this Honorable Court order as follows:

1. The Marshal shall sell the chlorine separately on ten days' advertisement at an upset price with appraisal of \$30,000.00 f.o.b. purchaser's barge, Geismar, Louisiana.
2. The Marshal shall sell the containers separately on ten days' advertisement at an upset price with appraisal of \$80,000.00 f.o.b. government barges, Port Allen Locks, Louisiana.
3. The Marshal shall return the proceeds less expenses of the sale of the chlorine and its containers and shall [fol. 38] deposit the same in the Registry of the Court.
4. The sale of the chlorine and its containers shall in no way prejudice the legal position of the parties to this litigation.

Louis C. LaCour, United States Attorney, Proctor
for United States.

Bardyl R. Tirana, Attorney, Admiralty and Shipping
Section, Department of Justice, Washington 25, D.C., Of
Counsel.

IN UNITED STATES DISTRICT COURT

Number 668

STATEMENT OF RESPONDENT UNION CARBIDE CORP. RELATIVE
TO LIBELANT'S MOTION FOR SALE—Filed January 15, 1963

To the Honorable, the Judges of the United States District Court for the Eastern District of Louisiana, Baton Rouge Division:

Now Into Court comes Union Carbide Corporation, named Respondent, appearing herein solely and for the limited purpose of stating its position relative to the Motion of the United States of America, Libelant, for the

sale of a cargo of chlorine now under seizure and states that Union Carbide Corporation makes no claim to the cargo of chlorine and, accordingly, has no opposition to the relief sought by said Libellant.

[fol. 39]

Jones, Walker, Waechter, Poitevent, Carrere & Denegre, By George Denegre, Robert B. Acomb, Jr., 1547 National Bank of Commerce Building, New Orleans 12, Louisiana, Proctors for Respondent, Union Carbide Corporation.

IN UNITED STATES DISTRICT COURT

Number 668

ORDER OF CONFIRMATION OF SALE—March 1, 1963

On the 1st day of March, 1963, came on before the Court the petition of the United States Marshal that the Court confirm the sale of the chlorine and containers ex Barge WYCHEM 112. After due consideration, it appears to this Court that the granting of the foregoing petition will be for the best interest of all concerned; it is therefore:

Ordered, Adjudged and Decreed by the Court that:

1. The sale of the chlorine and containers ex Barge WYCHEM to the Stauffer Chemical Company for the sum of \$85,000.00 be confirmed.
2. The United States Marshal shall take his costs and commission from the proceeds of the sale and shall [fol. 40] pay the balance into the Registry of the Court.
3. The Clerk of the Court, in order to prevent the proceeds from lying idle pending final disposition of this case, shall invest the proceeds in One-Year Treasury Bills of the United States of America.

Rendered and entered at Baton Rouge, Louisiana, this 1st day of March, 1963.

E. Gordon West, United States District Judge.

IN UNITED STATES DISTRICT COURT

Number 668

ORDER AMENDING ORDER OF MARCH 1, 1963—

Dated April 3, 1963

It appearing to the Court that numbered paragraph "3" contained in the Order of Confirmation of Sale, dated March 1, 1963, and providing for the investment of the proceeds of the sale, is not in accordance with established procedures heretofore used in connection with moneys deposited in the Registry of the Court,

It Is Ordered that the said Order of Confirmation of Sale, dated March 1, 1963, be, and the same is hereby, amended striking out said numbered paragraph "3".

Baton Rouge, Louisiana, April 3, 1963.

[fol. 41] E. Gordon West, United States District Judge.

IN UNITED STATES DISTRICT COURT

Number 668

MOTION OF WYANDOTTE TRANSPORTATION COMPANY TO DISMISS AND ALTERNATIVE MOTION FOR SUMMARY JUDGMENT
—Filed April 1, 1963

To the Honorable, the Judges of said Court:

Comes now, Wyandotte Transportation Company, one of the Respondents, and respectfully moves the Court for an order dismissing the libel herein on the ground that it does not state any cause of action upon which a judgment against said Respondent can be based, or, in the alternative, that it enter, pursuant to Rule 58(b) of the Supreme Court Admiralty Rules, a summary judgment in this Respondent's favor, dismissing the action on the ground that there is no genuine issue as to any material fact and that this Respondent is entitled to a judgment as a matter of law:

The motion to dismiss is based upon the libel herein attached hereto as Exhibit A.

The alternative motion for a summary judgment is based upon:

1. The libel herein, attached hereto as Exhibit A.
- [fol. 42] 2. The affidavit of William R. Day, Secretary and Legal Director, Wyandotte Transportation Company, attached hereto as Exhibit B.
3. Letter of November 14, 1961 from L. A. Thompson, Fleet Engineer, Wyandotte Transportation Company to Col. James E. Welch, District Engineer, U. S. Corps of Engineers, Vicksburg District, attached hereto as Exhibit C.
4. Letter of September 25, 1962, from Col. Warren S. Everett, District Engineer, U. S. Corps of Engineers, Vicksburg District to Wyandotte Transportation Company, attached hereto as Exhibit D.

McCreary, Hinslea & Ray, 860 Union Commerce Bldg., Cleveland 14, Ohio, By Lucian Y. Ray and Terriberry, Rault, Carroll Yancey & Farrell, Whitney Bank Building, New Orleans 12, Louisiana, By Alfred M. Farrell, Jr., Proctors for Respondent, Wyandotte Transportation Company.

(EXHIBIT A: Libel in Admiralty Number 668. Copied herein on pages 20 to 29.)

[fol. 43]

EXHIBIT B TO MOTION

STATE OF MICHIGAN,
COUNTY OF WAYNE, ss:

AFFIDAVIT

WILLIAM R. DAY, after being first duly sworn, deposes and says that at the times herein mentioned and at the present time, he is Secretary of Wyandotte Transportation Company and Wyandotte Chemicals Corporation; that Wyandotte Transportation Company is a wholly owned subsidiary of Wyandotte Chemicals Corporation; that at

the times herein mentioned the Barge Wychem 112 was owned by Wyandotte Transportation Company and was being operated under bareboat charter by Wyandotte Chemicals Corporation; that on March 17, 1961, the loading of 1,110 tons of liquid chlorine on the Barge Wychem 112 was completed at the Geismar, Louisiana plant of Wyandotte Chemicals Corporation and on March 21, 1961, said barge and cargo departed from said plant in tow of the M.V. Eastern; that the cargo was owned by Union Carbide Corporation and was to be delivered to its plant at South Charleston, West Virginia.

On March 23, 1961, the Barge Wychem 112, while in tow of the M.V. Eastern, sank in the Mississippi River at approximately the 352.5 mile mark, approximately seven miles below Natchez, Mississippi.

[fol. 44] At the time of the accident the water was at high level and continued to rise thereafter. From March 24 through April 16, 1961 unsuccessful attempts to locate the sunken barge were made by representatives of her owner, her underwriters and by the U. S. Navy. After the water level subsided and during the period from September 6th through September 9th, extensive diving and dragging operations were conducted by a firm of marine divers employed by the vessel owner, without success.

During the period from September 26th through October 3, 1961, a further search was made by the use of a magnetometer. This instrument was owned and operated by an outside firm. It was used, during the search, under the supervision of representatives of the owner and underwriters of the sunken barge. Although the position of two underwater objects were disclosed it was determined that it would not be feasible to identify and reach the Barge Wychem 112 which appeared to be buried under hard packed sand and silt so a decision to abandon the Barge Wychem 112 was made.

On November 14, 1961 a letter addressed to Col. James E. Welch, District Engineer, Vicksburg District, P. O. Box 60, Vicksburg, Mississippi, bearing the caption "Abandonment of Barge Wychem 112, Official No. 283729" and signed

[fol. 45] by L. A. Thompson, Jr., Fleet Engineer, Wyandotte Transportation Company, was placed in the U. S. mails at Wyandotte, Michigan. In said letter Wyandotte Transportation Company abandoned all of its right, title and interest in the Barge Wychem 112 to the Government of the United States.

On October 1, 1962 the aforesaid L. A. Thompson, Jr., received a letter dated September 25, 1962, addressed to Wyandotte Transportation Company and signed by Col. Warren S. Everett, District Engineer, in which the tender of abandonment of November 14, 1961 was accepted and in which we were informed that the Corps of Engineers was proceeding to remove the Barge Wychem 112 under authority of the Secretary of the Army and under the provisions of Section 19 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C.A. 414).

Further affiant saith not.

/s/ WILLIAM R. DAY
William R. Day.

SWORN TO and subscribed in my presence this 18th day of March, 1963, at Wyandotte, Michigan.

/s/ LEONARD K. BREWER
Leonard K. Brewer, Notary Public
Wayne County, Michigan
Commission Expires: 3-5-66.

[fol. 46]

EXHIBIT C TO MOTION

WYANDOTTE TRANSPORTATION COMPANY

Wyandotte, Michigan

November 14, 1961

Col. James E. Welch, District Engineer
U. S. Corps of Army Engineers
Vicksburg District
P. O. Box 60
Vicksburg, Mississippi

RE: Abandonment of Barge WYCHEM 112
Official No. 283729

Dear Sir:

It was reported to Wyandotte Chemicals Corporation on March 23, 1961, that on that date at approximately 0645 EST, the barge WYCHEM 112 had sunk in the Mississippi River at approximately the 352.5 mile mark, seven miles below Natchez, Mississippi. At the time of the sinking, the WYCHEM 112 was upbound from Geismar, Louisiana in tow of the M.V. Eastern, owned and operated by the Union Barge Line Corporation; and laden with 1,110 tons of liquid chlorine. The WYCHEM 112 is owned by the Wyandotte Transportation Company, a wholly owned subsidiary of Wyandotte Chemicals Corporation of Wyandotte, Michigan. It was operated under bare boat charter by Wyandotte Chemicals Corporation. The cargo being [fol. 47] carried by the barge was the property of Union Carbide Corporation and was bound for delivery at South Charleston, West Virginia.

The loss of the WYCHEM 112 was reported to our underwriters; U. S. Salvage Association, New Orleans, Louisiana; U. S. Coast Guard, New Orleans, La.; and the U. S. Army Corps of Engineers, Natchez, Mississippi.

Mr. Webb Kaiser of Wyandotte Chemicals Corporation Geismar Works proceeded to Natchez and there met with Mr. D. Ford of the U. S. Salvage Association, representing the underwriters. Kaiser contacted Captain William C. Smith, Master of the M. V. EASTERN and later he and Ford met with Captain J. Evans, Master of the M. V. ORLEANS, the Engineering Corps vessels working the area.

Captain Smith freely gave the information concerning the sinking, that he had transmitted to his shore office. In this report, he stated that weather conditions and visibility were good, but that the river was running high and the current at the reported sinking position was very strong.

Captain Smith states in his report that the cause of the disaster was as follows: "Strong current and an eddy at this location caused the barge to dive and sink." Captain [fol. 48] Smith elaborated further in his report essentially as follows: "At 6:45 A.M., EST, at mile 352.5 at the position shown on the diagram (a copy of the diagram was not obtained but indicated a position off light 352.5 or Morville Upper Light), Barge WYCHEM 112, loaded started to dive. The Master was on watch and he backed the EASTERN full astern to try to stop barge from diving. Due to the strong current, the barge kept on going. The stern of the barge raised up about four feet and snapped the rigging holding the barge. The port string of barges in the tow hit the diving barge and broke loose from the tow."

On March 24, 1961, Kaiser, Ford and Captain Evans of the U. S. Engineers on board the M.V. ORLEANS, made several runs over the reported area of the wreck and found no firm evidence as to actual position. However, Captain Evans indicated that there appeared to be a disturbance on the surface of the river within the reported area. This, in his opinion, was a possible clue as to the wreck's position. Captain Evans has worked this stretch of river for some 25 years and knows it well; accordingly, his opinions were considered valuable.

The following day, March 25, 1961, L. A. Thompson, Jr., the Fleet Engineer for Wyandotte Transportation Company's Great Lakes Fleet, arrived in New Orleans, to take charge of disaster details. The Geismar Works personnel reported their findings up to this point and Kaiser returned to Baton Rouge.

The next day, March 26, 1961, Mr. J. Tynan, Principal Surveyor of the U. S. Salvage Association's New Orleans Office, was contacted and it was requested that he set up a meeting with salvors in the area for the purpose of arranging search and salvage operations.

It is pertinent at this point to note that the river level at the time of the sinking was 42.4 feet, based on the Natchez gauge, which corresponds to 59.7 feet above mean sea level. These figures resolved to actual depths in the area of 25.7 feet minimum to 149.7 feet maximum. Further, a current of approximately 8 m.p.h. was running and a considerable amount of debris was being carried downstream.

The aforementioned meeting between salvors, underwriters' and owners' representatives was held, and it was agreed that because of river conditions, dragging or diving to locate the wreck, was not practical. At that time, the best estimate as to when the river level would subside was two months hence. This later proved to be an optimistic conclusion.

[fol. 50] Since it was apparent that other seache methods would have to be employed, outside assistance was sought. The U. S. Coast Guard was not equipped to assist, and declined. The U. S. Engineers had already made attempts with a fathometer and were unable to come up with any promising clues. Admiral Fred Warder, Commander of the 8th Naval District was then contacted and it was arranged with his staff to conduct a search using a helicopter with "dunking" sonar. This unit was to be from their anti-submarine squadron.

On March 29, 1961, a search was made by the Navy with the underwriters' and owners' representatives on the scene. This search was not successful, due presumably to electronic equipment failure.

On April 16, 1961, a second effort was made by the Navy, two helicopters being used, and a contact was made. This, of course, was a strong possible location of the wreck, but still had to be checked by divers. However, the river level was much too high for diving operations.

The consensus of opinion at this time was that there was little to do but wait for low water. Meanwhile, general plans for salvage were formulated. River levels, however, continued to rise and were reported to be the highest in some ten or fifteen years. On May 22, 1961, at a time original estimates called for low water, the river stage at Natchez was approximately two feet above flood stage with a gauge reading of 50 feet, or 7.6 feet above the level at the time of the disaster. During June and July, the water level subsided somewhat, and in July a meeting of the underwriters' and owners' representatives and salvors was called.

At this meeting, the salvors were given all information at hand and bids were requested for the search for and salvage of the wreck. Those bids were received late in July and analyzed by the Owners and Underwriters, and John S. Read Marine Divers of Beaumont, Texas was selected for the job. Read conducted extensive fathometer, dragging, and diving operations from September 6th through September 9th, without success. It became obvious at this point, that conventional search methods could not produce results.

In investigating and trying to develop other search procedures, we learned of the Magnetometer Method. The Magnetometer will measure the strength of the earth's magnetic field, and since large masses of magnetic materials tend to concentrate and intensify the field, they can

be located by this device. The services of Mossington and Sawtelle, Magnetometer operators, were employed. This [fol. 52] firm has a Magnetometer which is mounted on a one-man submarine that it towed by an aluminum catamaran. The rig was transported to Natchez from Detroit, and Mossington and Sawtelle, supervised by underwriters and L. A. Thompson, Jr. conducted a search of the area for the period September 26th to October 3rd, 1961.

Prior to the actual search, the Magnetometer had been calibrated, using a moored barge of dimensions similar to the WYCHEM 112 and a characteristic reading was secured. During the search, the ability of the Magnetometer to detect underwater objects was proven by its reaction to underwater pipelines of known position.

The approximate area of search covered was between mile marks 358 and 344 and two Magnetometer reactions typical of those of a barge were recorded. One was approximately one mile downstream from the reported sinking position, and the other was at the reported position. Taylor Diving of New Orleans was then employed to investigate the two positions and attempt to identify the submerged objects.

Underwater search of both positions disclosed that the objects one of which was presumed to be the WYCHEM 112, were buried under 15 to 20 feet of hard packed sand and silt. Thus, it was impossible to reach them.

[fol. 53] At this point, it was decided that further efforts to definitely identify, and subsequently salvage the Barge WYCHEM 112, would not be feasible with the result that said barge constitutes either an actual or constructive total loss. Consequently, on October 23rd, we tendered abandonment of the wreck to our underwriters who have declined to accept the abandonment.

We believe further efforts to locate or salvage the wreck would be unsuccessful.

In conclusion, based on the foregoing, we, as owners of the Barge WYCHEM 112, hereby abandon all our right, title and interest in the said Barge WYCHEM 112 to the Government of the United States, and, as such owner, we will assume no further responsibility for said sunken vessel or its cargo, from this date henceforth.

will you kindly acknowledge receipt of this letter at your earliest convenience?

Respectfully Submitted,

WYANDOTTE TRANSPORTATION COMPANY

/s/ L. A. THOMPSON, JR.
L. A. Thompson, Jr.
Fleet Engineer

CC: Mr. W. D. Carle, III
McCreary, Hinslea & Ray
860 Union Commerce Building
Cleveland 14, Ohio

[fol. 54]

Mr. Donald Carlson
Johnson & Higgins
First National Building
Detroit 26, Michigan

V. G. Niebergall, Captain, U.S.C.G.
Senior Investigating Officer
328 Custom House
New Orleans, Louisiana

Mr. C. H. Beard, Gen. Traffic Manager
Union Carbide Company
270 Park Avenue
New York 17, N.Y.

Mr. J. Tynan, Principal Surveyor
U. S. Salvage Association
610 Delta Bldg., 348 Baronne Street
New Orleans, Louisiana

Messrs. A J Denizer, G. W. Schwarz
Wyandotte Transportation Company

EXHIBIT D TO MOTION

U. S. ARMY ENGINEER DISTRICT, VICKSBURG
CORPS OF ENGINEERS

U. S. POST OFFICE AND COURT HOUSE BLDG.
Vicksburg, Mississippi

In Reply Refer
To Symbol *LMKVL*

25 September 1962

Wyandotte Transportation Company
Wyandotte, Michigan

Gentlemen:

We refer to your letter of 14 November 1961, Subject: [fol. 55] "Abandonment of Barge WYCHEM 112, Official No. 283729", giving notice that you were abandoning the Barge WYCHEM 112. We acknowledged receipt of this letter of 22 November 1961. On 26 July 1962, we clarified our letter of 22 November 1961 by noting that it only acknowledged your tender of abandonment and stated that the Government did not accept the abandonment in any manner which would convey title or responsibility for the vessel to the United States, because we did not at that time consider the sunken Barge WYCHEM 112 as an obstruction to navigation.

We received your letter of 21 August 1962 stating that you planned to make a further search and resurvey of the reported sinking area of the Barge WYCHEM 112 and requesting information about river levels, the speed of the current and bottom contour changes in that area. However, we have delayed answering your letter since subsequent to our advice to you on 26 July 1962, the Secretary of the Army reconsidered the determination as to obstruction and found that it was in fact an obstruction to navigation. We are, therefore, proceeding under authority of the Secretary of the Army to remove the chlorine Barge

WYCHEM 112 under provisions of Section 19 of the River and Harbor Act of 3 March 1899 (33 USCA 414).

We have located the sunken Barge WYCHEM 112 and [fol. 56] are proceeding immediately to conduct salvage operations.

Accordingly, in view of the very grave danger to public health and to navigation that will exist until we remove the chlorine cargo from the Mississippi River, we hereby accept your tender of abandonment of 14 November 1961. The United States will assume full responsibility for the removal and disposal of the Barge WYCHEM 112 and its cargo. After recovery of the Barge WYCHEM 112 and/or its cargo, the United States will retain the right of possession and title thereto as salvor.

Sincerely yours, -

/s/ WARREN S. EVERETT
WARREN S. EVERETT
Colonel, CE
District Engineer

IN UNITED STATES DISTRICT COURT

Number 668

EXCEPTIONS OF UNION BARGE LINES CORPORATION—
Filed April 1, 1963

Comes now Union Barge Line Corporation, respondent, and excepts to the libel of United States of America on the ground that the same fails to state a cause of action against respondent upon which relief can be granted for the reasons that (1) libellant is not entitled to reimbursement of expenses incurred in pursuance of a public duty [fol. 57] and (2) there is no legal basis for recovery herein either in the common law or in the statutes of the United States.

New Orleans, Louisiana, March 29, 1963.

Lemle & Kelleher, By: George B. Matthews, By:
George A. Frilot, III, Proctors for Union Barge
Line Corporation, 1836 National Bank of Com-
merce Building, New Orleans 12, Louisiana.

IN UNITED STATES DISTRICT COURT

Number 668

MOTION OF UNION BARGE LINE CORPORATION FOR
SUMMARY JUDGMENT—Filed April 1, 1963

Comes now Union Barge Line Corporation, respondent, and moves the Court to enter summary judgment in its favor in accordance with the provisions of Rule 58 of the Admiralty Rules of the Supreme Court of the United States on the ground that the pleadings and the letter attached hereto and marked Exhibit "A" for identification, being a letter from the United States Army Engineer District, Vicksburg, Corps of Engineers, to Wyandotte Transportation Company, Wyandotte, Michigan, dated September 25, 1962, show that defendant is entitled to a judgment [fol. 58] as a matter of law.

New Orleans, Louisiana, March 29, 1963.

Lemle & Kelleher, By: George B. Matthews, By:
George A. Frilot III, Proctors for Union Barge
Line Corporation, 1836 National Bank of Com-
merce Building, New Orleans 12, Louisiana.

(EXHIBIT A: Copied herein on pages 42 and 43.)

IN UNITED STATES DISTRICT COURT

Number 668

EXCEPTIONS OF UNION CARBIDE CORPORATION TO LIBEL AND,
ALTERNATIVELY, MOTION TO DISMISS—Filed April 4, 1963

To the Honorable the Judges of the United States District Court for the Eastern District of Louisiana, Baton Rouge Division:

Exceptor, Union Carbide Corporation, pursuant to Rules 27 and 35 of the Admiralty Rules of the Supreme Court of the United States specifically excepts to Articles Eighth, Tenth, Twelfth and Fourteenth of the Libel on the grounds that the allegations contained in Articles Eighth, Tenth and Twelfth of the Libel are irrelevant, immaterial and incompetent, and contain conclusions and matters of law and conclusions of fact rather than specific pleadings of fact. Exceptor further excepts to Article Fourteenth of [fol. 59] the Libel on the grounds that it is not a comprehensive statement of the damages as required by the Rules.

Union Carbide Corporation further shows that the Libel fails to state a claim against Union Carbide Corporation upon which relief can be granted and must be dismissed. Alternatively, Union Carbide Corporation moves that the Libel filed herein be dismissed since Libelant does not have a cause of action which may be asserted herein against this Respondent.

George Denegre and Robert B. Acomb Jr. of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, 225 Baronne St., New Orleans 12, Louisiana, Proctors for Exceptor.

IN UNITED STATES DISTRICT COURT
Number 668

MOTION OF UNION CARBIDE CORPORATION FOR
SUMMARY JUDGMENT—Filed April 4, 1963

Union Carbide Corporation, Respondent herein, moves for a summary judgment on the grounds that under the law and the facts there is no responsibility on part of this respondent for the matters alleged in the Libel. Mover relies upon the affidavit attached to this motion and the law cited in its attached memorandum of authorities. Mover respectfully requests that this Court grant a summary judgment in Mover's favor dismissing the Libel filed herein.

[fol. 60] Respectfully submitted,

George Denegre, Robert B. Acomb, Jr., Jones,
Walker, Waechter, Poitevent, Carrere & Dene-
gre, 225 Baronne Street, New Orleans 12, Louisi-
ana, Proctors for Mover.

Number 668

AFFIDAVIT OF D. E. WITTENBERGER

State of New York,
County of New York:

Before me, the undersigned authority, a notary public in and for the State and County aforesaid, personally came and appeared D. E. Wittenberger, who, after being duly sworn by me, notary, did depose and say:

That he is Purchasing Agent of Union Carbide Corporation. That as Purchasing Agent of said Corporation he has possession of and access to the files of said Corporation in connection with the purchase by said Corporation of

liquid chlorine from Wyandotte Chemicals Corporation. Affiant gives this affidavit based upon both Corporation records and his personal knowledge.

Affiant states that the cargo of liquid chlorine transported aboard the Barge WYCHEM-112 was purchased by Union [fol. 61] Carbide Corporation from Wyandotte Chemicals Corporation pursuant to a contract entered into between said corporations, a copy of which contract is hereto attached, made a part hereof and marked "Exhibit A". That Union Carbide Corporation took no action whatsoever in connection with the arrangement of transportation of the cargo of liquid chlorine loaded aboard the Barge WYCHEM-112, nor did Union Carbide Corporation, through its employees or any other representatives, have any contact with the common carrier, Union Barge Line Corporation, in connection with any movement of liquid chlorine aboard the Barge WYCHEM-112.

Affiant further states that Union Carbide Corporation did not own the Barge WYCHEM-112 and that apparently the Barge WYCHEM-112 was owned by Wyandotte Transportation Company, a subsidiary of Wyandotte Chemicals Corporation. Union Carbide Corporation had no contract, either directly or indirectly, with Wyandotte Transportation Company, and Union Carbide Corporation's only contract was said contract (Exhibit A) with Wyandotte Chemicals Corporation. That, pursuant to the terms of said contract between Union Carbide Corporation and Wyandotte Chemicals Corporation, Wyandotte Chemicals Corporation agreed to, and in fact did undertake to, provide a barge to transport the cargo of liquid chlorine from Geismar, Louisiana, to Charleston, West Virginia, and in fact did provide the Barge WYCHEM-112. That Union Carbide Corporation [fol. 62] did not at any time charter the Barge WYCHEM-112, nor did it at any time have any ownership or any interest of any character whatsoever in said barge, or any control of said barge.

That pursuant to said contract the loading of the Barge WYCHEM-112 at Geismar, Louisiana, was under the exclusive care, custody and control of Wyandotte Chemicals

Corporation. Union Carbide Corporation was not present through any employees or any other representatives at the loading of said Barge WYCHEM-112. That Union Carbide Corporation did not, at any time have any employees or any other representatives present aboard the M/V Eastern, owned by Union Barge Line Corporation, and that the towing services performed for said barge were solely and exclusively under the control and supervision of Union Barge Line Corporation.

That pursuant to said contract, all arrangements made concerning the loading of the liquid chlorine aboard the Barge WYCHEM-112 and the transporting of the Barge WYCHEM-112 and its cargo were made by Wyandotte Chemicals Corporation. Union Carbide Corporation did not participate in any manner whatsoever in, and had no knowledge concerning, the contractual arrangements between Wyandotte Chemicals Corporation, Wyandotte Transportation Company and Union Barge Line Corporation.

[fol. 63] Pursuant to said contract between Wyandotte Chemicals Corporation and Union Carbide Corporation, Wyandotte Chemicals Corporation agreed to sell " * * * liquid Chlorine * * * in Seller's (Wyandotte Chemicals Corporation's) tank barge or barges, * * * to be shipped to Buyer's (Union Carbide Corporation's) Charleston, W. Va., plant, * * * " and although Union Carbide Corporation insured itself against loss of or damage to the cargo, it did not exercise any incidents of ownership in the cargo and did not exercise any control of the cargo whatsoever.

D. E. WITTENBERGER.

Sworn to and subscribed before me the 2nd day of April, 1963.

Marie Coen
Notary Public.

Number 668

EXHIBIT "A" TO AFFIDAVIT

CHLORINE-CAUSTIC SODA SALES AGREEMENT

This AGREEMENT, made the 13th day of July, 1960, between WYANDOTTE CHEMICALS CORPORATION, a Michigan corporation whose address is Wyandotte, Michigan (hereinafter referred to as SELLER), and UNION CARBIDE CHEMICALS COMPANY, DIVISION OF UNION CARBIDE CORPORATION, a New York corporation, whose address is 30 East 42d Street, New [fol. 64] York 17, New York (hereinafter referred to as BUYER).

SELLER agrees to sell to BUYER and BUYER agrees to purchase from SELLER, units of chlorine and 50% liquid caustic soda, 76% Na_2O basis (hereinafter called "caustic soda"), under the following terms and conditions:

1. *Quantity and Shipment.* Buyer's partial requirements at the rate of approximately ten (10) Units (as hereinafter defined) per calendar day of liquid chlorine in SELLER's tank barge or barges, or at the maximum rate as can be delivered in SELLER's two—1000-ton capacity barges assigned to this service, which ever is the greater, to be shipped to BUYER's Charleston, W. Va., plant, and caustic soda in SELLER's tank cars, F.O.B. SELLER's works, to be shipped to BUYER's Institute, W. Va., plant, or the Linde Company's plant at North Tonawanda, N. Y., or Visking Company's plant at Chicago, Illinois, as BUYER shall elect.

Should BUYER's partial requirements for Units of chlorine and/or caustic soda increase over BUYER's estimate of its contemplated partial requirements on the date of this agreement for the period of this agreement, SELLER shall have the opportunity to furnish such additional partial requirements under the same terms and conditions as herein provided.

BUYER assumes no obligation to purchase any specific [fol. 65] quantity hereunder, any provision herein to the

contrary notwithstanding, provided, however, that in the case of chlorine, BUYER agrees to purchase from SELLER no less than the percentage of its actual requirements of chlorine that 40 tons per day bears to its actual requirement on the date of this agreement.

2. *Price Unit* as adjusted under the provisions of Paragraph 4 hereof, F.O.B. SELLER's works, transportation charges up to /ton on chlorine shipments to be for BUYER's account; any excess to be prepaid and allowed by SELLER; and freight equalization, nearest recognized producing point, to be allowed by SELLER on caustic soda shipments.

3. *Unit.* A Unit shall consist of four (4) tons of liquid chlorine and one (1) ton of caustic soda. Calendar quarterly adjustments in billing shall be made as follows: The number of Units purchased in any calendar quarter hereunder shall be determined by dividing the number of tons of chlorine purchased by four (4); and the resulting number of Units shall be multiplied by the Unit price to give the "Gross Quarterly Billing," which shall then be adjusted according to subparagraphs A or B below:

(A) If the number of tons of caustic soda purchased in the same calendar quarter shall be less than of the aforesaid number of tons of chlorine, SELLER will credit [fol. 66] BUYER for the difference between such 25% and the caustic soda purchased at the rate of of the Unit price per ton.

(B) If the number of tons of caustic soda purchased in said calendar quarter is more than 25% of the aforesaid number of tons of chlorine, BUYER will be charged with that amount of caustic soda in excess of such of the Unit price per ton, less applicable actual freight equalization allowance.

4. *Price Escalation.* Any increase or decrease from time to time in the price per ton of liquid chlorine or

liquid caustic soda, as published in the OIL, PAINT AND DRUG REPORTER, a publication of The Schnell Publishing Company, above or below the corresponding price in effect as of the date of this agreement, as adjusted in accordance with the following formula, shall be added to or subtracted from the price per Unit set forth in Paragraph 2 hereof.

To the Unit price as last adjusted shall be added or subtracted the net change in the lowest published price per ton of caustic soda, F.O.B. SELLER's works, tanks car lots, BUYER's cars, multiplied by and the net change in the lowest published price per ton of liquid chlorine, F.O.B. SELLER's works, single container tank car lots, BUYER's car lots, BUYER's cars, [fol. 67]-multiplied by

Any such increase or decrease shall be effective hereunder as of the date OIL, PAINT AND DRUG REPORTER states that such increase or decrease became, or is to become, effective.

5. *Invoices and Payment.* SELLER shall render calendar monthly invoices to BUYER for the number of Units purchased hereunder, such number of Units to be determined as stated in Paragraph 3. Such invoices shall be payable on or before the tenth day of the next succeeding calendar month. Quarterly the ratio of caustic soda to chlorine shall be considered and any adjustments under Paragraph 3 shall be also billed and/or credited.

6. *Term.* The initial term of this Agreement shall be for the calendar year 1961 and year-to-year thereafter, unless either party shall have given written notice to the other to the contrary on or before October 1, 1961, and on or before September 1 of any subsequent contract year.

7. *Taxes.* Any sales, use, or excise tax or other charge imposed directly upon the liquid chlorine or liquid caustic soda sold hereunder, by federal, state, or municipal authorities, hereafter becoming effective within the life of this Agreement, shall be paid by BUYER.

8. *Force Majeure.* Failure of either party to perform [fol. 68] its duties and obligations hereunder if caused by fire, storms, floods, strikes, lockouts, accidents, war, riots or civil commotions, inability to obtain railroad cars or material, embargoes, any state or federal regulation, law, or restriction, seizure or requisition of materials specified in this contract by the Government of the United States or of any state, or of any agency thereof, or by reason or any compliance with a demand or request for such material for any purpose for national defense, or any other cause or contingency beyond the reasonable control of said party (whether or not of the same kind of nature as the causes or contingencies above enumerated) shall not subject the party so failing to any liability to the other, to the extent that such failure is attributable to any of the foregoing causes.

9. *BUYER's Responsibility.* BUYER assumes full liability and responsibility for compliance with federal, state, and municipal laws, ordinances, and regulations governing unloading, discharge, storage, handling, and use of the liquid chlorine and liquid caustic soda supplied hereunder, and also all liability for results of use by BUYER thereof, whether alone or in combination with other products or materials.

10. *CLAIMS.* Claims against SELLER on account of quality, errors in weight, are waived unless made in writing [fol. 69] within thirty (30) days after arrival of shipment at destination, and SELLER's liability for damages hereunder shall in no case exceed the purchase price of the particular shipment with respect to which such damages are claimed, plus transportation charges paid thereon.

11. SELLER hereby agrees that the materials produced hereunder will be in compliance with all applicable requirements of Sections 6, 7, and 12 of the Fair Labor Standards Act, as amended, and of Regulations and Orders of the United States Department of Labor issued under Sec-

tion 14 thereof, and agrees to so certify on its invoices if so directed by BUYER.

12. *Price Protection Clause.* If at any time during the contract period BUYER receives a bona fide offer of similar material of like quality at a price at which the cost to BUYER for such material delivered at BUYER's plant would be below the cost to BUYER for material hereunder delivered at BUYER's plant, and SELLER on receiving evidence of this offer refuses; or within 15 days thereafter fails to meet such lower price, then BUYER may purchase elsewhere at such lower price such amounts as it may desire or terminate the agreement.

13. *Favored Nation Clause.* If, during the period of this agreement, the SELLER shall sell to any other vendee in the United States of America, material of similar [fol. 70] quality as the aforesaid product, in like or smaller total quantities and upon similar terms to those covered hereby and at a price lower than that then in effect hereunder, the BUYER shall be entitled to such lower price on the quantities delivered to it hereunder so long as such lower price is in effect with respect to such other vendee.

14. *Notices.* Notices hereunder shall be deemed properly given, if in writing, transmitted by registered or certified mail, and addressed to the respective parties at the addresses first hereinabove given, or at any duly noticed change thereof.

15. *Non-Supersession.* This Agreement does not supersede the Agreement dated January 12, 1960, as amended, and it is understood that any purchases and deliveries made hereunder will be in addition to any purchase and delivery obligations called for under the Agreement dated January 12, 1960, as amended.

IN WITNESS WHEREOF, the parties have signed and executed this Agreement, through their duly authorized officers, as of the date first hereinabove given.

WYANDOTTE CHEMICALS CORPORATION (SELLER)

By ROBERT B. SEMPLE /s/
Robert B. Semple, President

[fol. 71]

ATTEST:

WILLIAM R. DAY
/ William R. Day, Secretary

UNION CARBIDE CHEMICALS COMPANY
DIVISION OF UNION CARBIDE CORPORATION (BUYER)

By R. C. SCHMITZ /s/
Purchasing Agent

ATTEST:

JOHN CONWAY /s/

EXHIBIT "B": Letter dated November 14, 1961 from L. A. Thompson Jr., Fleet Engineer, Wyandotte Transportation Company, to Col. James E. Welch, District Engineer, U. S. Corps of Engineers, copied herein at pages 36 to 41.
EXHIBIT "C": Letter from Warren S. Everett, Colonel, CE, District Engineer, dated 25 September 1962 to Wyandotte Transportation Company copied herein at pages 42 and 43.

[fol. 72]

IN UNITED STATES DISTRICT COURT

Number 668

AFFIDAVITS AND EXHIBITS OF LIBELANT IN ANSWER TO
MOTIONS FOR SUMMARY JUDGMENT—Filed July 15, 1963

AFFIDAVIT

Warren S. Everett, being duly sworn, deposes and says on personal knowledge that:

1. He is a Colonel in the United States Army Corps of Engineers and is District Engineer of the United States Army Engineer District, Vicksburg.

2. He wrote the following letters or telegrams, except letter of 22 November 1961 written by his Executive Officer, Captain Thomas W. Marshall, III, C.E., copies of which are attached:

- a. November 22, 1961, to Wyandotte Transportation Company.
- b. July 26, 1962, to Wyandotte Transportation Company.
- c. September 25, 1962, to Wyandotte Transportation Company.
- d. October 16, 1962, to General Counsel, Union Carbide Corporation.
- e. October 23, 1962, to Wyandotte Transportation Company.

[fol. 73] 3. The listed letters or telegrams were all written pursuant to the Code of Federal Regulations for the Corps of Engineers, 33 C.F.R. § 209.410, which reads as follows:

Abandonment of wrecks. By the maritime law the owner of a vessel which is sunk without fault on his part may abandon the wreck in which case he cannot

be held responsible for removing it even though it obstructs navigation. That law has not been changed by section 15, 19 and 20 of the River and Harbor Act of March 3, 1899 (30 Stat. 1152, 1154; 33 U.S.C. 409, 414, 415), which fully recognize the owner's right of abandonment. However, a person who willfully or negligently permits a vessel to sink in navigable waters of the United States may not relieve himself from all liability by merely abandoning the wreck. He may be found guilty of a misdemeanor and punished by fine, imprisonment, or both, and in addition may have his license revoked or suspended. He may also be compelled to remove the wreck as a public nuisance or to pay for its removal.

4. In no way did he have the authority, nor did he waive or vary the liability under 33 C.F.R. § 209.410, of [fol. 74] Union Carbide Corporation, Wyandotte Transportation Company or Union Barge Lines Corporation, nor did he understand that anyone was asking him to do so, nor did he intend to delegate any assumed authority to his Executive Officer, Captain Thomas W. Marshall to act contrary to Code of Federal Regulations, 33 C.F.R. § 209.410 quoted in paragraph 3 above.

Warren S. Everett.

State of Mississippi
County of Warren

Personally appeared before me, a Notary Public in and for said County and State, Warren S. Everett, who being duly sworn, acknowledged that he executed the foregoing affidavit on the date shown therein.

Given over my hand and seal at Vicksburg, Mississippi, this 19th day of June, 1963.

T. E. Edmonds, Notary Public, My Commission expires October 6, 1966.

(Seal)

C
O
P
Y

22 November 1961

LMKKC

Wyandotte Transportation Company
Wyandotte, Michigan

ATTENTION: Mr. L. A. Thompson, Jr.

[fol. 75] I refer to your letter dated 14 November 1961 stating that you have abandoned barge WYCHEM 112 which was sunk in the vicinity of mile 353 AHP Mississippi River on 23 March 1961.

Under provisions of the River and Harbor Act, approved 3 March 1899 the Owner's right of abandonment of a vessel which is sunk in a navigable stream without fault on his part is fully recognized.

Your letter advising that you are abandoning this barge will be properly recorded in the records of this office for future guidance.

Sincerely yours,

Thomas W. Marshall, III, Captain, C.E., Executive
Officer.

26 July 1962

LMKVL

Wyandotte Transportation Company
Wyandotte, Michigan

Gentlemen:

On 22 November 1961 we acknowledged receipt of your letter of 14 November 1961, giving notice that you were abandoning the Barge WYCHEM which sank in the Mississippi River at Mile 353 AHP on 23 March 1961.

Your representative at the Chlorine Institute on 11 July 1962 reported that you abandoned the Barge WYCHEM to the Corps of Engineers. Please note that our letter of 22 November 1961 only acknowledged your tender of abandonment, and you should not construe our letter as an inference that we accepted the abandonment. This will confirm our position that we did not then and have not "accepted" abandonment of the WYCHEM in any manner by which title or responsibility for the vessel is conveyed to the United States.

The Corps of Engineers can only accept abandoned vessels which obstruct navigable channels and which the provisions of 33 USCA 414 require the Corps of Engineers to remove as a hazard to navigation.

The sunken Barge WYCHEM that you abandoned has not been, and is not now, an obstruction to navigation.

Sincerely yours,

Warren S. Everett, Colonel, CE, District Engineer.

Copy to: Navigation Branch

(Copy of letter from Warren S. Everett, Colonel, C.E., dated 25 September 1962, to Wyandotte Transportation Company copied herein at pages 42 and 43.)

[fol. 77]

LMKVL

TELEGRAM

OFFICIAL BUSINESS
GOVERNMENT RATES

USA ENGR DIST, VICKSBURG
P. O. BOX 60, VICKSBURG, MISS.
16 October 1962

General Counsel
Union Carbide Co.
270 Park Avenue

Attention: Justin J. Karl, Esq.
New York, New York

RE: Chlorine Barge—WYCHEM 112.

Acting pursuant to the proclamation of the President of October 10, 1962, and pursuant to the Disaster Relief Act, 42 U.S.C. 1855, 1855a-1855g, the Corps of Engineers is engaged in removing liquid chlorine which is reported to belong to Union Carbide Company. We have been advised by the Cargo Underwriters that they have paid the loss to you and that they have not accepted the chlorine cargo as part of the adjustment.

The tanks of the barge WYCHEM 112 are being removed in order to get at the cargo. As you know, the chlorine cargo is an inherently dangerous substance and constitutes a nuisance which must be abated.

This is to advise that the Corps of Engineers intends to transfer the chlorine to a storage facility as soon as it is brought to the surface.

We feel sure that some members of your operating staff, either personally or through the Chlorine Institute have been keeping you advised of the difficult problems involved

[fol. 78] and that some branch of your company has a file on the situation.

The reason for this telegram is to advise you that if Union Carbide Company has any objection to this proposed plan, Union Carbide should reply by wire and state its position.

I am airmailing copies of this telegram to:

Mr. Archie Stevenson
Chubb and Son, Inc.
New York, New York

Neere, Gibbs and Co.
Cincinnati, Ohio

Warren S. Everett, Colonel, CE, U. S. Army Engineer District, Vicksburg.

LMKVL

.23 October 1962

Wyandotte Chemicals Corp.
Baton Rouge, Louisiana

Gentlemen:

Our lawyers have asked me to correct a misapprehension in the second paragraph of your letter of October 22, 1962, which they tell me makes no real difference in our intended operation.

You said that the chlorine cargo was the property of the United States. They tell me that there was no abandonment [fol. 79] ment from Union Carbide and that the cargo still belongs to Union Carbide, subject to the Government's lien for salvage and other related expenses, which probably will exceed the value of the cargo.

The cargo is being removed by the Government under the Disaster Relief Act, 42 USC 1855, 1855 e-g. We have sent a telegram dated 16 October 1962, to the General

Counsel of Union Carbide Company and have sent copies to Chubb and Son and to Neere Gibbs and Company, who represent the cargo underwriters. A copy of the telegram is inclosed. No reply has been received to their telegram.

Meanwhile, the cargo is in our possession as salvers and as the United States is abating a nuisance and protecting its citizens under the Disaster Relief Act, we will protect you against any suit by anyone challenging that possession.

Sincerely yours,

Warren S. Everett, Colonel, CE, District Engineer.

1 Incl Telegram

(Copy of telegram from Warren S. Everett, Colonel, CE, U. S. Army Engineer District, Vicksburg, dated 16 October 1962 addressed to General Counsel, Union Carbide Co., 270 Park Avenue, Attention Justin J. Karl, Esq., New York, New York, copied herein at pages 59 and 60.)

[fol. 80]

Number 668

AFFIDAVIT

Edward A. McDermott, being duly sworn, deposes and says on personal knowledge that:

1. He is the Director of the Office of Emergency Planning in the Executive Office of the President.
2. He has read the pleadings, the exceptions, motions to dismiss, and motions for summary judgment in this case.
3. The exceptions, motions to dismiss and motions for summary judgment are in error in stating that the Government action in abating the hazard created by the chlorine cargo of Barge WYCHEM 112 was solely under the Rivers and Harbors Act of 1899.
4. On the contrary, the Government acted under the President's executive powers and the Federal Disaster Act

(Public Law 875, 81st Congress, as amended), a matter known to the Director because he personally directed the action after conferences with the President. These conferences with the President were occasioned by the failure of the existing Rivers and Harbors Act of 1899 to cover chemical health hazards by poisonous gas cargo which was in tanks on a barge lying under twenty feet of silt. The Chief of Engineers questioned that there was any authority to act under the Rivers and Harbors Act in these premises.

[fol. 81] 5. The salvage operation had to be undertaken during the proper stage of the Mississippi River and time was of the essence. The President directed the Office of Emergency Planning to command and assume full responsibility for the abatement of the potential disaster. The Office of Emergency Planning ordered the Corps of Engineers to proceed immediately with plans to remove the chlorine cargo, and ordered the Department of Health, Education and Welfare to take public safety measures with the aid of the American Red Cross and other disaster agencies.

6. The entire cost of the salvage and public safety operation has or will come out of the Federal Disaster Act appropriation, and not out of the Rivers and Harbors Act appropriation. All Federal departments and agencies participating in the salvage and public safety operation paid the regular salaries of their personnel, their usual fringe benefits, and the administrative overhead costs which would have been paid in any event.

7. As late as May 1963, the problem of filling the legislative void has not been resolved.

Edward A. McDermott.

Subscribed and sworn to before me this 21st day of May, 1963.

Clara L. McGaha, Notary Public, My Commission Expires Sept. 30, 1967.

[fol. 82]

AFFIDAVIT

State of Texas
County of Harris

Before Me, the undersigned authority, on this day personally appeared Joseph J. Carroll who after first being duly sworn, upon his oath deposes and says:

I am President of J & J Marine Diving Co., Inc., 302 Cavalier Lane, Pasadena, Texas.

J & J Marine Diving Co., Inc., was called in by Brown and Root Marine Operators, Houston, Texas, to do the diving work on Operation Chlorine on October 1, 1962. I left Pasadena on the same day and arrived at the salvage site on October 2, 1962. I was on the salvage site from October 2, 1962 to November 6, 1962. I was in charge of all diving operations during the hours from 6:00 A.M. to 6:00 P.M. during that period.

The first day I went in the water to examine the Barge WY Chem 112, Liquid Chlorine Tank Barge, was October 15, 1962. I was in the water at the salvage site concerning this barge from October 15, 1962 to November 5, 1962 except for five or six days.

On October 30, 1962, I examined the entire stern section of the barge to determine what the conditions were from midship to the stern. There were no breaks, visible above the sand, in this section of the barge. The stern rake was completely uncovered. There was no sand on this rake. [fol. 83] All the bits were intact and exposed. The man hole cover on the stern rake was open and flat on the deck. The stern rake was full with sand. I did not examine the dogs on the cover. My main reason for examining the rake was to determine if enough sand had been removed to allow us to remove the two stern tanks.

From time to time as the barge was uncovered, the sand was removed. I examined the barge externally and internally. The only water tight compartments on the barge were the bow and stern rakes, except the four chlorine tanks. In my opinion, the bow and stern rakes did not have enough displacements to bring the barge to the surface if all the sand and water in these rakes had been removed and replaced with air.

In my opinion, the barge sank because the water built up to the extent that it came over the bow rake deck and flooded this bow rake provided the hatch was open. I noted the water could have (initialed JJC) built up high enough to come over the coaming and flooded into the tank well. In either case the barge would start to settle by the bow end and cause it to continue to flood herself. Also at this increased angle the liquid chlorine would flow to the bow end of the tanks and would help lower the bow.

[fol. 84] It is my opinion from inspecting and removing the midship loading deck section that the barge had to have buckled midships so that the bow and stern rakes were higher than the midship loading deck section. I believe this because the loading platform was bent down in the middle thortships and the metal around the loading domes was bent, ripped, rolled inward toward the center of this platform. Also the plating and beams under the deck were bent to conform to the contour of the chlorine tanks.

I have read the foregoing affidavit, and know the contents thereof, and believe the matters and facts herein to be true and correct.

Joseph J. Carroll.

Subscribed and Sworn to before me this 8 day of June, 1963.

Mrs. Mildred Carroll, Notary Public in and for
Harris County, Texas.

(Seal)

AFFIDAVIT

State of Texas
County of Harris

Before Me, the undersigned authority, on this day personally appeared John B. Galletti, Jr., who after first being duly sworn, upon his oath deposes and says:

[fol. 85] I am Vice President of J & J Marine Diving Co., Inc., 302 Cavalier Lane, Pasadena, Texas.

J & J Marine Diving Co., Inc. was called in by Brown And Root Marine Operators, Houston, Texas, to do the diving work on Operation Chlorine on October 1, 1962. I left Houston on the same day and arrived at the salvage site on October 2, 1962. I was on the salvage site from October 2, 1962 to November 6, 1962. I was in charge of all diving operations during that period during the hours of 6:00 P.M. to 6:00 A.M.

From about 7:00 A.M. on October 17, 1962 to 8:55 P.M. on October 19, 1962 the diving operations consisted of removing the deck section of the Barge WY Chem 112, Liquid Chlorine Tank Barge.

On October 20, 1962 the work started to remove the four chlorine tanks from this barge. The first tank was taken out on October 24, 1962. It was the upriver outboard tank. It could be described as the lower tank in the bow section. The second tank removed was the upriver inboard tank or the higher tank in the bow section. The second tank was removed on October 26, 1962. The third tank, downriver outboard or lower stern tank, was removed on November 1, 1962. The fourth tank, downriver inboard or higher stern tank, was removed on November 5, 1962.

From October 17, 1962 to November 5, 1962, except about [fol. 86] four or five days, I was in the water every day. On November 3, 1962, J. B. Stewart, Chief Field Operator, US Corps of Engineers, requested me to make a survey of bow section of this barge. I examined, by touch, the

entire bow section of this barge. The bow section was upstream and higher than the stern section. Both the bow and stern sections had a list of 20 to 25 degrees to the outboard or midstream side. Therefore the starboard side was higher than the port side. There was a break at the forward rake bulkhead and the tank well on the starboard side. At the deck line they were separated about one foot and still separated down in the sand. The rake deck section was about 2 inches lower than the tank deck section. The coaming should have been square at the corner but was ripped loose and rounded off. Inside the barge, there was a split about one and a half foot long about two feet down from the deck horizontal with the rake deck.

I examined the man hole and man hole cover on the starboard side of the bow rake deck. There was about one-half to one inch of sand on the rake deck at that time. The manhole cover was completely open and flat on the rake deck. The sand level inside of rake was level with the top of the coaming of the man hole. The rake was [fol. 87] completely full with sand. All four dogs were intact and working free. I worked all four dogs by hand and found them to be in working order.

The starboard and port running lights were missing. The center white running light was there but bent. I checked the air vent on the bow rake and found it was open.

I have read the foregoing affidavit, and know the contents thereof, and believe the matters and facts herein to be true and correct.

John B. Galletti, Jr.

Subscribed and Sworn to before me this 8 day of June, 1963.

Mrs. Mildred Carroll, Notary Public in and for
Harris County, Texas.

(Seal)

Number 668

AFFIDAVIT

County of Hartford,
State of Connecticut, ss.:

Glenn R. Hilst, being duly sworn, deposes and says upon personal knowledge that he is Vice President of the Travelers Research Center, Inc., a non-profit research and development corporation incorporated under the laws of the State of Connecticut; that in 1957 the University of Chicago [fol. 88] conferred upon him the degree of Doctor of Philosophy in meteorology; and that prior to coming to the Travelers Research Center in 1960, he had been employed since 1954 by General Electric Corporation as an expert in diffusion of materials in stable atmospheres at the Hanford, Washington works of the Atomic Energy Commission.

That he personally made the hereinafter listed calculations regarding the hazard created by the sinking of the 2,220,000 pound chlorine cargo of Barge WYCHEM 112; and that the calculations are true and correct to the best of his knowledge and belief.

That the following conditions were assumed for the calculations:

1. Surface temperature inversion.
2. Minimum realistic atmospheric dispersion conditions consistent with the mode of release of the chlorine gas.
3. Windspeed of 4 miles per hour.
4. A point of release at the surface of the Mississippi River above the sunken Barge WYCHEM 112, approximately 10 kilometers southwest of Natchez, Mississippi.

That the calculations show the following results:

- I. For a maximum total release of 93,000 pounds of [fol. 89] chlorine gas, absolutely lethal exposures would have been experienced up to 12 kilometers from the point of release, which could have included Natchez, Mississippi. In addition, severely incapacitating exposures, including some deaths, would have been experienced to distances greater than 50 kilometers from the point of release.
- II. For an indeterminate total release of 58,000 pounds of chlorine gas, absolutely lethal exposures would have been experienced up to 11 kilometers from the point of release, which could have included Natchez, Mississippi. In addition, severely incapacitating exposures, including some deaths, would have been experienced to distances approximately 40 kilometers from the point of release.
- III. For a minimum total release of 45,000 pounds of chlorine gas, absolute lethal exposures would have been experienced up to 6 kilometers from the point of release. In addition, severely incapacitating exposures, including some deaths, would have been experienced to distances between 25 and 30 kilometers from the point of release.

[fol. 90]

Glenn R. Hilst.

Mr. Glenn R. Hilst, the above undersigned, does hereby state that the above facts are true and accurate to the best of his knowledge and that the above signature is applied willingly.

Rose R. Dinsmore, Notary.

My commission Expires April 1, 1965.

(Seal)

Number 668

AFFIDAVIT

County of Harford,
State of Maryland, ss.:

James W. Mannion, Jr., being duly sworn, deposes and says upon personal knowledge that he is the Assistant Branch Chief of the Chemical Process Engineering Branch of the Chemical Process Division, United States Army Chemical Research and Development Laboratories, Edgewood Arsenal, Maryland; that he received the degree of Bachelor of Engineering in 1949 from Johns Hopkins University, and of Master of Science in 1954 from Northwestern University; and that he has been a chemical engineer at the Edgewood Arsenal since 1956.

That he personally made the hereinafter-listed calculations [fol. 91] regarding the hazard created by the sinking of the 2,220,000 pound chlorine cargo of Barge WYCHEM 112; and that the calculations are true and correct to the best of his knowledge and belief.

That the following conditions were assumed for the calculations:

1. Each of the four containers of Barge WYCHEM 112 contained 550,000 pounds liquid chlorine at 85.5 p.s.i.a.
2. The containers were under 40 feet of water.
3. Water temperature was 60 degrees Fahrenheit.
4. The containers were made in accordance with the specifications of Avondale Shipyards engineering drawings of the cargo tank details, No. C 1224-T1 and No. C 1224-T2.
5. All physical and thermodynamic data were taken from the Chlorine Handbook (Diamond Alkali Co., Cleveland, 1962).

That the calculations are as follows:

- I. If one container is ruptured while submerged there would be an almost instantaneous release of 58,800 pounds of chlorine gas at the river surface. If more than one tank is ruptured the release would be proportionately greater.
- II. If the tank hatch and dome assembly is detached [fol. 92] while a container is submerged, there would be a release of 58,800 pounds of chlorine gas at the river surface at an initial rate of 1,150 pounds per second, approximately 45,000 pounds being released within the first minute after detachment.
- III. If a relief valve fails while a container is submerged there would be a release of approximately 45,000 pounds of chlorine gas within the first hour after failure.
- IV. If one container is ruptured while at the river surface, there would be an almost instantaneous release of 93,000 pounds of chlorine gas.
- V. If the tank hatch and dome assembly is detached while a container is at the river surface, there would be a release of 93,000 pounds of chlorine gas at an initial rate of 1,320 pounds per second, approximately 51,500 pounds being released within the first minute after detachment.
- VI. If a relief valve fails while a container is at the river surface, approximately 52,000 pounds of gas would be released within the first hour after failure.

James W. Mannion, Jr.

[fol. 93] Subscribed and sworn to before me this tenth day of June, 1963.

Charles B. Cohen, Notary Public in and for the State of Maryland, My Commission expires May 3, 1965.

(Seal)

[fol. 94]

AFFIDAVIT

E. D. Fales, Jr., being duly sworn, deposes and says on personal knowledge that he is the author of "Time Bombs in the Mississippi," an article appearing in the April, 1963, issue of Popular Science Monthly, and a copy of which is attached hereto; that the article is a reconstruction of the sequence of events relating to the sinking of Barge WYCHEM 112 and the raising of its chlorine containers; that the article was based on personal research and interviews with many of the people concerned, as reported therein; that certain assumptions in minor details, such as the exact words used in portions of the dialogue, have been made in the interests of dramatic narrative; and that the article is true and correct to the best of his knowledge and belief.

E. D. Fales, Jr.

New York

Subscribed and sworn to before me this 13th day of June, 1963.

Esther Eyl Talbert, Notary Public, State of New York, No. 24-9276475, Qualified in Kings County, Cert. filed in New York Co., Commission Expires March 30, 1964.

[fol. 95]

TIME BOMBS IN THE MISSISSIPPI

Four tanks of liquid death—chlorine—lay at the river bottom, ready to spew a lethal gas over two states.

By E. D. Fales Jr.

Two states braced for disaster. All ships on the Mississippi had been warned. Six thousand residents had fled Vidalia, La., and Natchez, Miss., where a 15-car escape train waited to gather up hundreds more. At least 40,000 gas masks had been given out, for at any moment a choking yellow cloud might spread like a horrible ghost into the night over Louisiana and nearby Mississippi.

The U. S. Weather Bureau had set up six emergency stations to test the slightest shift in wind, on which the safety of 70,000 now might hang.

Armed troops waited along Mississippi roads to snatch wrecked cars away and keep traffic moving if the gas came. Disaster workers flew in. The Red Cross evacuated the sick. Over Louisiana highways came a parade of vans—the disaster fleet of the Louisiana State Police.

In 20 towns, meetings were called. If the gas comes, citizens were told, *move fast and keep moving.*

A circle 60 miles across was declared the danger zone. It reached from Fayette, Miss., west to Acme, La., taking in long stretches of U. S. Highways 61 and 84. On the Mississippi River, ships and barges heading toward Natchez [fol. 96] were stopped and gas masks given crews and passengers.

Somewhere at the bottom of the river lay four weird time bombs that together contained more poison gas than was used in any major battle of World War I.

The nightmare had begun at dawn on March 23, 1961. The 3,500-hp. diesel towboat Eastern had been battling upriver behind 16 barges, hugging the eastern shore, working north in quiet backwaters.

Its barges rode four abreast. The left-front one, called Wychem 112, was making a 1,200-mile voyage from Baton Rouge to Charleston, W. Va. It carried a cargo for a large chemical company—four monster green-and-white steel tanks. Each, if stood on end, would tower over a six-story building. Rising from each was a steel dome that protected sensitive safety valves. The domes carried the ominous lettering, CHLORINE.

Seven miles south of Natchez, all northbound ships make the Natchez Island crossing. At 4:47 a.m., in hazy light, the Eastern came to the crossing and headed for the western shore. And at this moment the four front barges smashed headlong into a vicious spring-flood current.

A bow wave built up. Three of the four leading barges rode it out. But from Wychem 112 came staccato sounds like gunfire as the giant wave raced across her deck and crashed into her hold.

[fol. 97] The sounds were Wychem's cables parting. Swamped by the wave, the barge poked her bow under the surface, shot down like a submarine—and vanished mysteriously.

The river here, in flood, was 100 feet deep. The Army Engineers patrol boat that sped to the scene, fathometer going, should have had no trouble picking up strong echo signals from such a huge wreck. But no signals came back. And, later, when divers went down, they found no trace of a wreck at all.

No one worried—yet. A newspaper quoted an official as saying that a shipment of chlorine had sunk, but if any escaped it would merely “purify the muddy Mississippi.” This was a remarkable statement in the light of later events.

Liquid chlorine is a pale-yellow fluid. Released from tank pressure, it turns into green-yellow chlorine gas. By coincidence, not many days earlier, a railroad tank car of chlorine had burst in a train wreck near New Roads, La. A green-yellow cloud had scourged the countryside for

six miles. Over 100 people were taken, choking, to hospitals. A child died. Hundreds of animals were killed. Yet this had been a relatively small shipment, a mere 20,000 pounds. By contrast, there was 2,200,000 pounds of liquid chlorine in the four submerged tanks.

But more than a year passed during which the prosperous Valley towns lived in blissful ignorance. Then last summer [fol. 98] someone told the U.S. Public Health Service: Somewhere at the bottom of the river was enough chlorine to fill a whole train of tank cars. Since all wrecks rust, it was only a matter of time before it would escape. There was also the danger that a ship might ram the wreck, for the river was dropping 60 feet to a 40-foot summer depth. Or a falling anchor might smash the tanks. Or weakened safety valves might blow.

Quickly, the nation's "disaster central"—the office of Emergency Planning in Washington—swung into action. On September 7, a decision was made. Since the Army Corps of Engineers keeps rivers navigable, it would be their job. Orders went to the Vicksburg district: "Find those tanks. Use any means to get them out—fast." The district chief in Vicksburg, Col. Warren S. Everett, read his orders and whistled. If rust had set in, even minutes might count. But where were the tanks?

A remarkable search began. Three days later, a Navy submarine-hunter plane, cruising low near Natchez Island, began getting strikes on its electronic sub-hunting gear. Yet this was an area that had been carefully searched before. The answer lay in the shifting sands of the river bottom. The barge had become a restless ghost, moving with the sands.

A crew was sent to drill the river bottom. Water-jet probes, which would not burst the tanks, were used. The [fol. 99] next afternoon, 65 feet below the surface and 14 feet deep in sand, a probe hit a hard object. The Wychem, after a year and a half, had been found.

Col. Everett moved fast. On September 30, his salvage contracts were let. At 4 a.m. the next day a \$10 million commando salvage fleet was highballing toward the scene from a Gulf Coast port 600 miles away. It included two towering hammerhead derrick-barges, an ocean tug, two floating crew-hotels, and 20 other craft. At the same time, rolling east from California came trucks bringing 16 "wind machines"—gasoline-powered fans used in fighting Western forest fires. Should the gas escape, engineers would try to roll it back behind a wall of wind to give the 130 crewmen a chance to get off their ships.

A call went out for divers. Courage and skill were needed: Underwater cutting torches, burning at 5,000-degrees F., would have to be held steadily within an inch and a half of the steel tanks. This would be like holding a lighted match beneath a fuse, for steel, in chlorine, lights up and burns at 400 degrees.

The salvage contracts went to two Gulf Coast engineering outfits: Triple-C Boats, Inc., and Brown & Root, marine operators.

In all the excitement, few citizens had noticed three [fol. 100] dusty pickup trucks from Texas that plowed along the levee near Natchez and discharged their load: a pile of diving suits, some underwater cutting torches, and eight solemn-faced men—divers.

They came from an outfit called J & J of Pasadena, Tex. The two Js stand for Joe and John: Joe Carroll president and chief diver, and John Galletti, vice-president.

Lights glittered all over the salvage fleet when Carroll, Galletti, and six hand-picked divers saw it. A curtain of sound hung in the night: the whine of compressors, the roar of wind-machines tuning up, the clatter of hammers.

For days before they dared enter the river, Carroll and his team pored over blueprints of the Wychem, memorizing every rivet. Meanwhile, a diving station was set up on the Bolin, one of the two derrick barges.

When Carroll dived on October 14, he was appalled by the blackness of the river. It was like diving into strong coffee. He couldn't see his hand before his helmet, or even the little round window itself. He dropped cautiously, letting himself down a hand line. He wore no diving shoes, only soft galoshes. He didn't want to kick holes in rusty metal.

A diver lives by his lifeline—and his tender. Carroll's tender, a little man in a red steel hat, happened to be another Joe Carroll; his father. As Joe Jr. descended, [fol. 101] his father cautiously fed out lifeline—air pipe, steel safety wire, and phone line all wrapped in one.

Underwater, Joe Jr. let himself drop slowly. He was 20 feet down when he heard the propellers of a big barge train, similar to the one to which the Wychem had belonged, fighting its way up the other side of the river. Then a surge of water swept past him, swinging him away from the hand rope. Though the barges were a quarter-mile away, the underwater current they set up were trying to tear him away from his hand line.

Carroll hung on hard, waiting for the currents to subside, then continued on down. He was to have this experience many times, whenever a large ship or barge train passed. Now, letting himself down, he was suddenly stopped at 40 feet. His feet had hit something soft.

He groped cautiously and felt a small mound of sand. Wishing desperately that he could see, he thought of calling for floodlights but decided they'd be useless.

In the darkness, he had three fears: He might kick a hole in a rusted tank; he might dislodge heavy wreckage that could smash a tank; or he might disturb the sensitive spring-loaded safety valves on top of each tank, set to blow off under certain emergencies. The valves were shielded inside the protective steel domes. But if they were damaged or had become seriously rusted, they might now [fol. 102] be frail as paper. He lay prone to spread his weight and began digging carefully.

Minutes later Carroll's voice reached those on deck. "I'm on the dome of a tank and the damned safety hatch is wide open!" He was right over the naked valves. If they popped off now, he'd be instantly caught in a geyser of yellow chlorine.

Carroll backed away cautiously, coming to rest on a sand drift that he knew must cover a tank. Clammy forces began pulling at his feet. He moved to escape and a moment later his helmet rang against a hard object. He'd floated into a grotesquely twisted steel handrail reaching up as though the Wychem were trying to climb out of its sandy grave.

The bottom of the Mississippi River is never still. It flows slowly, like a moving sidewalk—toward the sea. The curious force clutching at Carroll's feet was the effect of shifting sands. It was these that had buried the Wychem so quickly. If he made a misstep they might bury him, too.

For days, two Army dredges had been doing their best to uncover the wreck, sucking away mountains of loose sand. But since they had not dared drop their clumsy "suction snouts" near the tanks, they had dug a vast crater around it. This crater now was 800 feet wide, and the Wychem rose at its center.

Carroll phoned his discoveries to the deck. Still blind, he now found that by shutting his eyes he could get a better sense of feel and direction. After that, he always worked with his eyes shut.

[fol. 103] For two hours he explored, and what his fingers "saw" appalled him. It had been an impact wreck. The Wychem had rammed the bottom with enough force to bend itself in half and hurl its 100-foot stern half, along with two tanks, upward until they had tried to fold over the forward half. Then the stern had fallen back.

Toward noon Carroll went topside. "It's one hellish mess," he told his team. "Before we can go for the tanks, we've got to airlift."

An airlift is an angry pipe with the kick of a mule. Get between it and a wall and it will smash your ribs. This one was a 10-inch-diameter, 85-foot-long steel suction pipe.

Night had fallen when the airlift was ready, and John Galletti went down into the river to receive it. He grabbed it in a bear hug and guided it down between the tanks. He drove his shoulder against it and called for power.

The mule began to kick. With a roar, the airlift went to work. On one side of the pipe a high-pressure water jet blasted the sand between his feet, loosening it. On the other, a screaming air jet, turned upward into the bottom of the airlift, created a mighty siphon. Galletti heard sand and stones booming up in the big pipe; the airlift was beginning its work.

Other divers relieved him: Herb Atwood, Norman Knudsen, Jim Bush, Don Hackin. Then Galletti took over again. [fol. 104] Toward midnight, those on deck heard a cry: "Cut!" Galletti's left foot had been pulled into the suction pipe. Someone cut the power. He withdrew his foot and went on dredging. More and more, the tanks were being exposed. Yet the shifting sand kept trying to cover them up. Once diver Tom Hynson used the water jet to hose off the tank tops. It was like using a garden hose under water.

For three days and nights the airlifting went on. On the 19th, Carroll went down to size up the situation.

The No. 1 tank on the port forward side, to be tackled first, was tipped, and slowly creeping toward a sharp steel edge of the barge. The No. 2 tank hung ominously above No. 1. The after tanks, 3 and 4, were in better shape. But all had snapped some of their steel tie-downs, the powerful five-inch straps that anchored them to the barge. And if enough tiedowns snapped unexpectedly the tanks might roll.

Falling wreckage was a hazard. The tank walls were only $1\frac{3}{8}$ inches thick, and tests had shown that even a small hole would grow by chemical action. Liquid chlorine, spurting out, would become a gas, bubble to the surface, and hang low over the river. Even a mild seven-mile-an-hour breeze could blow it into Natchez in an hour.

But the great danger was the electric torches. They can cut through steel as though it were butter. The flick of a flame against a tank could mean disaster.

[fol. 105] Carroll's best torch man was a big Texan named Will Brown. "Wee Willie" had one weakness: The greater the danger, the more he hated to quit.

This was the man Carroll chose to start the surgery. His assignment was to burn away tangled railings and pipes, then cut the loading deck—a large steel platform—into sections for lifting.

On October 19, Brown went down with his pistol-like torch. Eyes shut, standing on the No. 1 tank, he found a torn railing, pushed the torch against it and called: "Make it hot!"

On the Bolin, someone closed a switch, throwing 400 amperes into the torch. Brown pulled the trigger and waited for the dazzling flame that, he expected, would help him see.

He heard a sizzling sound. But no light came. His fingers grew hot; the torch was blazing not two feet from his eyes, and he couldn't see it. He thought: "Now I do need eyeballs in my fingers."

Almost immediately he made another discovery: The flame refused to bite the steel. Barge and tanks had been painted with tough epoxy-resin paint. After 18 months it was still protecting the metal: He had to burn it for a full 15 seconds before the flame would touch steel. Even so, he often had to chisel or file the paint away.

[fol. 106] To cut the supporting beams, it was necessary to crawl under the deck. Brown had just begun a cut there when the explosion came.

They heard it up on the Bolin. The loudspeaker squawked wildly and thunder shook the deck. Task Force Chief Ira Boswell and Salvage Chief W. B. Nelson heard it in disbelief. Men reached for gas masks. Then there was silence, and from the depths, a dark, bubbling swirl appeared.

The silence was broken by the urgent chatter of an outboard motor. Coming fast was a 21-foot surveillance boat, Corky, with engineer Curtis Love at the helm. Love yanked the throttle open and raced the Corky directly into the swirl, his free hand spraying the air with gas-detecting fluid from an atomizer.

If gas were spewing from the river, the fluid-ammonium hydroxide—would turn white, and Love would push the panic button. If he sounded a siren, all hands would abandon. The task force command would broadcast: "MAYDAY MAYDAY MAYDAY FLASH MAJOR ESCAPE OF GAS. ABANDONING." A headlong rush for shore would begin. And as the news spread 70,000 civilians would rush to cars, buses, and evacuation trains.

As Love reached the swirl, many eyes watched. Three times he squeezed the atomizer. Each time the spray hung briefly and remained clear. No chlorine—yet.
[fol. 107] But what had happened below?

Wee Willie Brown's cutting torch was a type fed by oxygen and hydrogen, and at times both gases escape unburned. When Brown went under Wychem's deck, the gases were trapped in an explosive mixture. Working blind, he could not see the gathering bubble, or red-hot bits of metal from his torch.

The blast came with no warning. There was a sudden roar. Brown's head rang, the live torch was torn from his hands, and he felt himself hurled through the water. Then he went numb all over.

He came to and heard Joe Carroll on the phone. Carroll was coming down. Suddenly Brown remembered his torch, humming with 400 amperes. He shouted topside: "Make it cold. Make it cold!" Someone cut the power.

Then Brown, angry at being tossed around, found his torch and roared; "Hell, I'm all right. Make it hot!" He went to work again.

Diver Don Hackin got it next: A smashing explosion like a hand grenade sent him up, bleeding from the nose. After that Carroll went down again.

Hydrogen explosions do happen, but why were these repeating? Fingering his way, Carroll found the trouble: Beams under the deck had trapped gases in several pockets. There was only one thing to do: drain them all.

He called for a torch, crawled out on deck, and began [fol. 108] burning holes. Minutes later an explosion hurled him away and stunned him. He'd found the first pocket. He rested, waited for his numb arms to come alive, and then cut again, only to be hit by another blast.

"He worked for an hour," says engineer Ed Kyle. "He was half dead when we brought him up, but he'd bored more holes than a woodpecker." There were no explosions after that.

From October 20 to 22 there were many minor problems, each calmly met and solved. Col. Everett stayed close by in his patrol boat. But he never interfered, and thereby won the gratitude of engineers and divers. Once, diver Hackin got blown to the surface feet first, by a blast of air. Another time, Wee Willie's diving dress ripped and filled. He was hauled up and dumped upside down to drain. His worried mates then saw him grinning at them, upside down, through his window.

Repeatedly the divers crept along the big chlorine tanks, feeling the clammy sides until they found the five-inch-wide tie-down straps. They burned these, a mere inch or two from the tank walls, until they twanged apart. Sometimes they shoved small asbestos sheets between straps and the tank for safety.

All the loose wreckage, was lifted by the night of the 22nd, and the No. 1 tank was ready for its "strait jacket"—a monster steel claw called a strongback. This was 60 feet

long and weighed 30 tons. On October 23 it was gingerly [fol. 109] lowered astride the tank and the divers lashed the big chlorine-bearing egg to it with 12 sling cables. The derricks wouldn't chance lifting the tank lest it break in the middle. Instead, they would lift the strongback. This, in turn, would lift the tank, which now lay shakily in its clutches.

At midnight the strongback was ready. Early on the 24th a big impact wrench was lowered to give the sling-cable turnbuckles a last tightening. Then the divers came up. It was now up to the derricks. The lift would have to be silky smooth, so—in this diesel age—the job was given to steam.

Lift day, the 24th, had dawned clear and fearful. To avoid confusion, firemen and police ashore were ordered not to sound sirens for *any* emergency—but gas. Children in 40 schools went through drills.

At the emergency weather station on the levee, one small problem arose. A screech owl from a nearby wood had developed an interest in the whirling wind cuts. It kept flying out to sit on the weather vane, and upset the readings. Weathermen kept running out to chase the owl so they could flash the correct readings by radio. At sunup, the breeze was from the north, good for Natchez but ominous for scattered communities southward. During the day it might shift.

The great danger now was that the No. 1 tank would be dropped. It could be lashed to the strongback only in the tilted position it had assumed in the wreck. During the lift, [fol. 110] it would have to be leveled; and this readjustment would throw tremendous strain on the sling cables.

There was also a weight hazard. Under water, the tank weighed 130 tons. But as it came up, its weight would soar to 350 tons. To this the strongback added its 30 tons. Never before had the hammerheads on the Bolin and the Herman B had to lift 380 tons of death. On the derricks, a half mile of slender cable would be moving on 40 sheaves, and every strand would have to hold.

Joe worried about those tank valves. Pressure in the tank was 85 p.s.i. The valves were set to pop at 160. But suppose they had weakened? What would happen when river pressure, now helping to hold them shut, was taken away?

There was a piece of bad news. On final inspection, a diver reported that the No. 1 tank, again tipping slowly, had raised eight inches off its cradle and had moved dangerously closer to the sharp steel edge. Haste became urgent.

At 2:25, a final briefing was held on the Bolin. It was as solemn as a prayer meeting. Then at 2:30 all hands scrambled, and the Bolin's derrickman, Don Harbolt, climbed to his pulpit.

In his seat at the controls, Harbolt laid his rebreather mouthpiece handy over his shoulder. He looked down over his two great hoisting drums, wound with shiny new steel cable, and glanced across a gap of water toward the other [fol. 111] barge, the Herman B. Over there, derrickman K. E. Anderson was climbing to his own cab.

At 2:48, Task Force Chief Boswell on the Bolin radioed Col. Everett, watching from the wheelhouse of the Lipscomb a few yards away: "We are ready to lift, Colonel."

Everett replied quietly: "Proceed, Mr. Boswell."

Simultaneously, a voice said in both Anderson's and Harbolt's earphones: "Lift on both derricks, half speed."

Harbolt flipped two levers, knowing that Anderson, on the other barge, would do the same. There was a rumble. The big drums shifted sideways, to contact the diving disks, and began to turn.

The steam engine on the Bolin is a 50,000-pound-pull lift-and-draw-works engine, a modern version of an old classic. When Harbolt opened the throttle, steam hissed, a piston slid, and a driving wheel began turning—slowly, then in a fast blur. Harbolt saw his towering derrick shake. The cable, moving in 20 shining strands, drew taut as a violin string. Slowly the drums began to turn.

Then he felt the strain come. Backstays tightened. The steam engine settled down to a brittle puffing, and the whole barge, half as long as a football field, tipped forward slightly under the weight. In its underwater cradle, the tank stirred.

[fol. 112] At 2:50 p.m. the Bolin radioed: "The lift has begun." The word flashed to Natchez, Washington, New Orleans. It was heard in homes, stores, cars, by 70,000 anxious people. Miles away, ships heard and stopped. In his wheelhouse, Col. Everett spoke quietly into his microphone: "All communication channels please stay clear for emergency."

Far down in the wreck, the tank settled slightly and a quiver ran up the cables—a kind of nervous burp. Then Harbolt fed more steam. At three p.m. the tank was coming up 18 inches a minute.

Joe Carroll, ready to dive if needed, was worried. He knew that a major adjustment was now at hand.

Then Harbolt got a signal to stop while the Herman B brought up its end to put the tank on an even keel. Still 15 feet under water, the tipsy tank began to level off. Harbolt fed steam again and the derricks on the two barges once more lifted together.

At 3:17 someone standing near Carroll whispered, "Great God!" A clammy white shadow grew in the water, just under the surface, growing imperceptibly brighter and flickering with ripples. At 3:19, the No. 1 tank shouldered its way out of the river, slow as a rising moon.

All hands had known it would be big, but none expected anything like this. The clammy thing kept growing, a monster coated with slime, sand, and dirty water. Gas- [fol. 113] suited chemists waited like Lilliputians to board it and plug any leaks. Men with detectors were everywhere, spraying the air.

The daring little motorboat Corky now shot out and sprayed the rising valve-dome. But there was no sign of gas: The tank still was holding.

The major adjustment came moments later. With no warning, one sling cable lost its grip and slipped.

It happened in a wink. A new ripple raced up the hoist cables. Harbolt felt it in his derrick. Then all together, the sling cables slipped.

An ugly clang sounded from the tank. The 30-ton strong-back lost its grip and began to slide. Then—with an enormous shock—it caught a new grip. The shift was over almost before it began. The steam engines kept their steady, silky pull as if nothing had happened.

By 3:21, the No. 1 tank was up. Water jets were turned on the slimy metal so men could go aboard, without slipping, to ram caps over the valve. A barge took the horrible thing away. As the tank sailed down the river, its tough white paint glistened.

"That," said a watching diver, "is what held the whole damned thing together." The epoxy resin that had so brutally fought the torches had with equal stubbornness fought off the rust that could have brought disaster.

[fol. 114] It had been an incredible 10 days of frightening work, without pause day or night. And there was more to come. But by November 5, the other tanks were recovered and eight tired divers threw their badly battered helmets into trucks and headed back to Texas.

AFFIDAVIT

County of Warren,
State of Mississippi, ss.:

John R. Currey, being duly sworn, deposes and says that he is Supervisory Cartographer, Chief Drafting Section, for the United States Army Engineer District, Vicksburg, at Vicksburg, Mississippi; that he has prepared from the official records of the Corps of Engineers the annexed chart showing the state of the Mississippi River near Natchez in the year 1874; that he has prepared

from the official records of the Corps of Engineers the annexed chart showing the state of the Mississippi River near Natchez in the year 1962, and work performed with Federal funds upon the Mississippi River in the Natchez area from 1874 to 30 June 1962; and that the annexed charts are true and correct to the best of his knowledge, information and belief as derived from the aforesaid official records of the Corps of Engineers.

John R. Currey, Supv. Cartographer, Chief, Drafting Section.

[fol. 114a]

State of Mississippi
County of Warren

Personally appeared before me, a Notary Public in and for said county, Mr. John R. Currey, who being duly sworn, acknowledged that he executed the foregoing statement on the 25th day of April, 1963.

Given over my hand and seal at Vicksburg, Mississippi, this 25th day of April, 1963:

T. E. Edmonds, Notary Public; My Commission expires October 6, 1966.

(Seal)

(Chart of Mississippi River not included in Designation of Record for Reproduction.)

Number 668

AFFIDAVIT

Captain J. J. Evans, being duly sworn, deposes and says on personal knowledge that he is the Master of the Patrol Boat M/V ORLEANS, operated by the United States Army Engineer District, Vicksburg. That on March 23,

1961, he boarded the M/V ORLEANS where it was moored at Natchez, Mississippi shortly before 8:00 a.m. That the M/V ORLEANS was scheduled to leave Natchez at 8:00 a.m. on regular patrol duty. That upon boarding he turned on Channel 4 on the ship-to-ship radio. That as soon as the radio was on he heard the M/V EASTERN trying to reach the M/V ORLEANS. That when he re-[fol. 115] sponded over the ship-to-ship radio, the Master of the M/V EASTERN (whose voice he recognized and who identified himself as Captain Smith), notified him that the M/V EASTERN had sunk Barge WYCHEM 112 150 yards out from the left shore at Morville, mile 353 AHP; that Barge WYCHEM 112 was an open-hopper type barge with chemical tanks mounted in it; that Barge WYCHEM 112 was carrying 1,110 tons of caustic soda; that the M/V EASTERN was leaving the Barge WYCHEM 112 behind without having ascertained the exact location of the sinking; and that the M/V EASTERN was continuing up the Mississippi River with the remainder of the tow to locate a safe place to tie off the tow. That Captain Smith stated that he would appreciate any assistance deponent and the M/V ORLEANS could give in trying to locate the sunken Barge WYCHEM 112. That deponent then proceeded with the M/V ORLEANS to the reported point of sinking but was unable to locate the sunken barge. That deponent checked the depth of the river where the Barge was reported to have sunk and found that depth at the reported location was 72 feet. That at 9:00 a.m. deponent sent a radiogram to Thomas M. Irby of the Navigation Branch of the United States Army Engineer District, Vicksburg, informing the District of the sinking of the chemical barge. That shortly after he sent the radiogram Thomas M. Irby called him over the F.M. radio for further details regarding the sinking. That he repeated to Thomas M. Irby the substance [fol. 116] of his conversation with Captain Smith of the M/V EASTERN, particularly that part of the conversa-

tion wherein Captain Smith notified him that Barge WYCHEM 112 contained 1,110 tons of caustic soda. And that at no time prior to 11 September 1962 following the sinking of Barge WYCHEM 112 did deponent have any notice or knowledge that the cargo on board Barge WYCHEM was hazardous liquid chlorine rather than caustic soda.

Witness my hand this 14th day of May, 1963.

J. J. Evans, Captain, Master, M/V ORLEANS.

Number 668

AFFIDAVIT

Thomas M. Irby, being duly sworn, deposes and says on personal knowledge that he is the Chief of the Channel Section of the United States Army Engineer District, Vicksburg. That while on duty on March 23, 1961, he received a radiogram at about 9:30 a.m. (a copy of which is attached as Exhibit A) from Captain J. J. Evans, Master of the Corps of Engineers Patrol Boat M/V ORLEANS, which read: "M/V EASTERN, UNION BARGE LINES, SANK A CHEMICAL BARGE ABREAST OF MORVILLE UPPER LIGHT 6:45 AM THIS DATE, ABOUT 150 YARDS FROM LEFT SHORE. UNABLE TO LOCATE." That upon receipt of the radiogram he called Captain Evans aboard the M/V ORLEANS by FM [fol. 117] radio. That Captain Evans reported that the Master of the M/V EASTERN had called the M/V ORLEANS at 8:00 a.m., by ship-to-ship radio, giving notice that Barge WYCHEM 112 had sunk 150 yards out from left shore at Norville, Mile 353 AHP, and that Barge WYCHEM 112 was an open type barge with chemical tanks mounted in the barge and contained 1,110 tons of caustic soda. Captain Evans reported Barge was sunk in approximately 72 feet of water. That he made a memo-

randum of his telephone call with Captain Evans immediately following the call (a copy of which is attached as Exhibit B). And that at no time prior to 14 November 1961 following the sinking of Barge WYCHEM 112 did he have any notice or knowledge that the cargo on board Barge WYCHEM 112 was hazardous liquid chlorine rather than caustic soda.

Witness my hand this 14th day of May, 1963.

Thomas M. Irby.

EXHIBIT A TO AFFIDAVIT

RADIOGRAM

4 30 ORLEANS 9 AM 23 MAR 61

IRBY NAVIG BR

M/V EASTERN, UNION BARGE LINES, SANK A
CHEMICAL BARGE ABREAST OF MORVILLE UP-
PER LIGHT 6.45 AM THIS DATE, ABOUT 150 YARDS
FROM LEFT SHORE. UNABLE TO LOCATE.

EVANS

[fol. 118]

EXHIBIT B TO AFFIDAVITDISPOSITION FORM

FILE NO. LMKKC SUBJECT: Navigation Difficulty
at Morville, mile 353
AHP

TO: The District Engineer

FROM: Chief, Navigation Section

DATE: 8/23/61 COMMENT NO. 1

THRU: Chief, Operations Division
Chief, Navigation Branch

1. Captain Evans of the M/V Orleans reports that the M/V Eastern, owned by the Union Barge Line Company, Pittsburgh, Pa., sank a chemical barge, W. Y. Chem 112, 150 yards out from left shore at Morville, mile 353 AHP. Barge was sunk in approximately 72 feet of water. This was an open type barge with chemical tanks mounted in barge and contained 1,110 tons of caustic soda.

2. The Orleans has been unable to locate barge.

/s/ THOMAS M. IRBY
Thomas M. Irby
Const. Management Engineer
Chief, Navigation Section

[fol. 118a]

Number 668

AFFIDAVIT OF GEORGE J. BODIE

George J. Bodie, being duly sworn, deposes and says that he is a Commander in the United States Coast Guard, Chief, Merchant Marine Technical Branch, Office of the Commander, Eighth Coast Guard District; that he is the same person whose signature appears on the annexed plan; that upon this plan he has marked in red the location of the cracks on the Barge WYCHEM 112/ Avondale Shipyards, Inc., Hull Number 988; that he obtained the information as to the cracks from the divers who examined the hull and from examination of samples of the hull cut there from by the divers and brought to the surface.

George J. Bodie

Subscribed and sworn to before me this 27th day of May, 1963.

C. R. Hallberg, LCDR (4106) USCG, Legal Officer,
Eighth Coast Guard District.

(Seal)

Authorized to Act as Notary by 10 U.S. Code 936, 14 U.S. Code 636, and LSA RS 35:7.

(Chart annexed excluded from the designation of record for reproduction.)

[fol. 119]

GENERAL SERVICES ADMINISTRATION
NATIONAL ARCHIVES AND RECORDS SERVICE
THE NATIONAL ARCHIVES

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I Certify That the annexed copy, or each of the specified number of annexed copies, of each document listed below is a true copy of a document in the official custody of the Archivist of the United States.

Records of the Office of the Chief of Engineers
Record Group 77

File 29944

Letter of 17 February 1899

In testimony whereof, I, Wayne C. Grover, Archivist of the United States, have hereunto caused the Seal of the National Archives to be affixed and my name subscribed by the Assistant Archivist, Office of Military Archives in [fol. 120] the District of Columbia, this 24th day of June, 1963.

/s/ WAYNE C. GROVER
Archivist of the United States

By /s/ G. PHILIP BAUER

SUBJECT: River and Harbor Bill.

OFFICE OF THE CHIEF OF ENGINEERS
UNITED STATES ARMY

Washington, February 17, 1899

Hon. W. P. Frye,
Chairman, Committee on Commerce
United States Senate.

My dear Senator:

In response to your request of February 16, I give you herewith a general clause which will, I think, fully accomplish the purpose expressed in your note of February 16 and the ideas suggested by a conversation in your committee room on the 15th. The words suggested refer, of course, only to those works which can be successfully carried on by contract, and in such connection it is right for me to state that it is the desire of the Chief of Engineers to carry on all work by contract, so far as it is possible in the interest of the United States. But cases will arise in which, from the possession of plant, or from some special conditions of work, it is most desirable, and in [fol. 121] some cases a necessary condition of work, that the United States should have the authority to do the work by day's labor and purchase of materials in open market or by contract. In going over the river and harbor act as passed by the House, all such cases in which the carrying on of work by day's labor is desirable have been referred to in the amendments suggested in a copy of the act herewith.

In consultation with the Chairman of the River and Harbor Committee of the House of Representatives it was suggested that a general provision permitting, in all cases where continuing contracts are authorized, that the work, unless otherwise specified, may be carried on by contract

or otherwise would be advantageous, inasmuch as it would only be taken advantage of in proper cases.

The wording suggested for the general clause attached hereto only has reference to contract work. To permit the Secretary of War to exercise his judgment in certain cases, it can be modified in such cases, as follows:

"Improving dollars: *Provided*, That contracts may be entered into by the Secretary of War for such materials and labor as may be required for prosecuting such improvement according to project dated, not to exceed in the aggregate dollars, or such work may be carried on by day's labor and purchase of materials in open market, to be paid for [fol. 122] as appropriations may from time to time be made by law."

Attention is respectfully invited to a copy of H. R. 11795, herewith, in which are certain suggestions as to modifications considered desirable. A similarly corrected copy was given to Hon. T. E. Burton, and is probably already with your Committee. Memoranda attached to this copy of the Act explain briefly the reasons for the modifications suggested.

Of such modifications the majority relate to the omission of the names of the District Engineer Officers submitting reports. It is believed that such names are simply introduced for the purpose of defining the projects which the appropriations refer to. The change suggested in such cases confines the project to the same report, but is intended to permit the recommendations of the Chief of Engineers and the Secretary of War to rule in any question as to the intent of Congress.

In addition to the matter above referred to I beg to invite your attention to the following:

In accordance with the direction of Congress in Section 2 of the river and harbor act of June 3, 1896, the compilation

of all general laws that had been enacted from time to time by Congress for the maintenance, preservation and protection of navigable waters of the United States was prepared and submitted to Congress together with a draft [fol. 123] of an act embodying such provisions and enlargements of the aforesaid laws as the experience of this office had shown to be advantageous to the public interests. The draft submitted covered every subject embraced in the existing laws, with two exceptions, and was printed in House Document No. 293, 54th Congress, 2d Session, a copy of which is inclosed.

This proposed act I believe to be clear from ambiguity, and better adapted to serve the interests of commerce and navigation than the laws in their present form. The proposed act has 13 sections. The last three of which (Sections 11-13) were incorporated by the House Committee on Rivers and Harbors in the pending bill. (See sections 6 and 7 of H. R. 11795).

In my opinion it would be to the public interest to incorporate in the bill the remaining ten sections of the proposed act, and I can conceive of no objection thereto as these sections contain no new matter, but simply revise and make clearer and more definite laws that have been already enacted.

Sections one and two of the proposed act are intended to replace Section 7 of the act of September 19, 1890, as amended by section 3 of the act of July 13, 1892, and I beg to invite your attention to the accompanying brief giving special reasons why this particular law should be [fol. 124] revised and amended.

Very respectfully,

/s/ A. MacKENZIE

Lieut. Col., Corps of Engineers

7 inclosures.

GENERAL SERVICES ADMINISTRATION
NATIONAL ARCHIVES AND RECORDS SERVICE
THE NATIONAL ARCHIVES

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I Certify That the annexed copy, or each of the specified number of annexed copies, of each document listed below is a true copy of a document in the official custody of the Archivist of the United States.

Records of the War Department
Office of the Chief of Engineers
Record Group 77
Endorsement to File 31000

5 May 1899

In testimony whereof, I, WAYNE C. GROVER, Archivist of the United States, have hereunto caused the Seal of the National Archives to be affixed and my name subscribed by the Chief, Army and Air Corps Branch of the National Archives, in the District of Columbia, this 21st day of June, 1962.

[fol. 125]

/s/ WAYNE C. GROVER
Archivist of the United States

By /s/ VICTOR GONDOS, JR.

Cincinnati, O.

May 5, 1899.

Bixby, Maj. W.H.

Reqs. that such auth as is deemed proper by E. D. Dept. be delegated to him in the matter of removal of wrecks in the Ohio River. Under Sec. 13 R & H Act, Sept 19, 1890. Sec. 3 Act June 3, 1896, and Sec. 19 & 20 Act of March 3, 1899.

1st indorsement

OFFICE CHIEF OF ENGINEERS, U. S. ARMY

May 12, 1899.

Respectfully returned to Major Bixby

It is not thought that the enactment of sections 19 and 20 of the act of March 3, 1899, necessitates any particular change in the manner of removing wrecks from the Ohio River, nor in the operation of snag boats under section 13 of the act of September 19, 1890 and section 3 of the act of June 3, 1896. The effect of the legislation is simply to enlarge the powers of the Department for the benefit of navigation interests, and the general principles governing the subject remains unchanged.

Section 19 is practically the old law embraced in section [fol. 126] 4 of the act of June 14, 1880 and section 8 of the act of September 19, 1890, except that it permits earlier action by the Department.

Section 20 is intended to apply only in cases where navigation is completely stopped or specially endangered by a wreck, as for instance where it is sunk in a canal or lock, or in a narrow channel; and it is believed that the cases where it will be necessary to apply this law will be infrequent. As action under this section may involve the destruction of private property, careful judgment should be exercised in its application, and generally, the powers conferred by it should not be invoked unless the public

interest absolutely demands it. It is thought best that, for the present at least, the decision in all cases where it is proposed to apply this law, should be left to the Secretary of War, and, to that end, that all such cases should be reported to the Department, which can be done by telegraph involving a very slight delay.

Should it be demonstrated in the future that navigation interests would be better served by having engineer officers act in these matters without previous reference to the Department, the Secretary of War will be requested to delegate the needful authority.

This paper to be returned.

/s/ A. MACKENZIE
Acting Chief of Engineers

[fol. 127]

6545 Ohio Wks. REC'D CINTL., O. MAY 15 1899

2nd indorsement

U. S. Engineer Office,

Cincinnati, O. May 19, 1899

Respectfully returned to the Chief of Engineers U. S. Army, the necessary record having been made.

/s/ W. H. BIXBY
Major, Corps of Engineers, U.S.A.

Recd. Office Chief of Engrs. May 22, 1899

GENERAL SERVICES ADMINISTRATION
NATIONAL ARCHIVES AND RECORDS SERVICE

THE NATIONAL ARCHIVES

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I Certify That the annexed copy, or each of the specified number of annexed copies, of each document listed below is a true copy of a document in the official custody of the Archivist of the United States.

OFFICE OF THE SECRETARY OF WAR

RECORD GROUP NO. 107

RECORD CARD 1838

In testimony whereof, I, WAYNE C. GROVER, Archivist of the United States, have hereunto caused the Seal of the National Archives to be affixed and my name subscribed by the Chief, Army and Air Corps Branch of the National [fol. 128] Archives, in the District of Columbia, this 20th day of June, 1963.

/s/ WAYNE C. GROVER
Archivist of the United States

By /s/ VICTOR GONDOS, JR.

SUBJECT: "Cascade" Schooner Wreck of—in Black River
at Loraine, Ohio

FROM Acting Chief of Engineers

PURPORT OF COMMUNICATION. July 10, 1901

Returns telegram of Wm L. Hughes dated Loraine, Ohio asking whether the removal of a boat sunken in the harbor at that point rests upon the owner or the U. S. and states that he has reference to the sunken schooner "Cascade" lying in the Black River at Loraine, Ohio and as between the city and the owner of the boat it is not necessary for the W.D. to decide but is of opinion the burden of removal does not rest upon the U. S. that the vessel constitutes an obstruction caused by the voluntary or careless acts of those owning or controlling the boat and that the burden of removal rests upon them.

Recommends Mr. Hughes be so informed.

Letter of Alex J. Savoid, U. S. Inspector reporting on the matter herewith (Incl 1)

July 11 Recd Rec Div th CC 1 pm

July 15. Back Rec Div th JAG for remark 1-40 pm
 [fol. 129] . July 22 Back Rec Div with JAG indorsed report of even date that he is of opinion that under the circumstances the W.D. should not remove this wreck

July 23 To CC 11-50 am

W.D.W. July 31, 1901

Wm. L. Hughes, Esq.
 Lawyer
 Loraine, Ohio

Sir:

I have the honor to acknowledge the receipt of your telegram of the 29th ultimo as follows "Boat sinks in harbor. Neglect of owners, does Government, owners or city remove same"

In reply, I beg to advise you that your telegram was referred to the local engineer officer of the Department at Cleveland and that from a report made to him by an inspector, it was found that your inquiry has reference to the sunken schooner "Cascade" which was at one time used by a contractor engaged in dredging in Black River for the city of Lorain, and which after the completion of the work, was left by the contractor, where anchored or tied up, and eventually sunk.

Replying to the question whether the burden of removing this boat rests upon the United States, upon the owner by whose negligence it was sunk, or upon the city [fol. 130] of Lorain in whose service the boat was engaged, you are advised that as between the city and the owner of the boat it is not necessary for the War Department to decide, but that under the circumstances stated the burden of removing the boat does not rest upon the United States. It is believed the vessel constitutes an obstruction caused by the voluntary or careless acts of

those owning or controlling the boat and that the burden of removal rests upon them.

Very respectfully

Wm. Cary Sanger
Actg. Secy. of War

Mailed Aug. 1, 1901

Aug 1. Back Rec Div, th C of E 10-25 am Aug 2.

UNITED STATES OF AMERICA
TREASURY DEPARTMENT
WASHINGTON

Date: Jun 5 1963

ALL TO WHOM THESE PRESENTS COME, GREETING:

I certify that the annexed three (3) pages are a true copy of Memorandum for Merchant Marine Council relative for authorization to transport chlorine in bulk, by Chief, Port Security Division, dated 17 May 1943, as shown in Vol. 49, Journal of Merchant Marine Council, 1943, on file [fol. 131] in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

/s/ LUCILE HENDERSON
Chief, Directives Control and
Distribution Branch
Office of Administrative Services
Treasury Department

Mr. Harrison: Yes, and we have made a report on it.

Rear Admiral Johnson: Is there anything we can take exception to?

Mr. Harrison: No, sir.

Captain Heiner: If we give him tentative approval and after it is built, it cracks up, will we have to accept it?

Mr. Harrison: No. It first must meet the fundamental specifications and he understands that. This raft as indicated here is only a 15-person raft and there is no market for that and so he is now working on a 20-person raft. Until he can build one that will not fracture or fall apart, it won't be acceptable.

Captain Heiner: I was thinking about a raft after [fol. 132] being on board ship five or six months when it starts to get dried out.

Mr. Harrison: I don't see why that would be any more so than your plywood lifeboats.

Rear Admiral Johnson: If we gave it tentative approval, that would carry with it that it must pass all these fundamental tests.

Mr. Harrison: This just lets them go ahead and build their test boat.

Captain Heiner: If you give him tentative approval you indicate a moral obligation that you will accept it.

Mr. Harrison: Provided it meets our specifications.

Commander Jewell: I move that it be tentatively approved.

Mr. Harrison: I second it.

Action: The life raft was tentatively approved.

MMC-146

UNITED STATES COAST GUARD
WASHINGTON

THE COMMANDANT (OPS)
Refer to File: CG-6613

17 May, 1943

MEMORANDUM FOR MERCHANT MARINE COUNCIL

Subj: Request for authorization to transport chlorine in bulk

1. HQ is in receipt of a request from the Pittsburgh Plate [fol.133] Glass Company, Pittsburgh, Pennsylvania, for permission to transport liquid chlorine in tank barges on inland waterways and rivers emptying into the Gulf of Mexico. Compliance with this request will involve an amendment to the regulations governing the transportation of "Explosives and Other Dangerous Articles on Board Vessels".

2. There are attached hereto five sets of drawings submitted by the Pittsburgh Plate Glass Company identified as Dwgs. V-2098 and V-2099, indicating the manner in which it is proposed to transport the chlorine. Since these drawings were received the Technical Director and the Traffic Manager of Columbia Chemical Division, Pittsburgh Plate Glass Company visited HQ. As a result of their visit they decided to construct these tanks to the requirements of the regulations of the Coast Guard entitled "Marine Engineering Regulations and Material Specifications", deleting all reference to Interstate Commerce Commission specifications 105A500-W. It is understood that new plans showing this correction will be submitted.

3. Subsection 9 of R.S. 4472 provides: "Before any regulations or any additions, alterations, amendments, or repeals thereof are made under the provisions of this section, except in an emergency, such proposed regulations

[fol. 134] shall be published and public hearing with respect thereto shall be held on such notice as the (Secretary of Commerce) Commandant, U. S. Coast Guard deems advisable under the circumstances. Any additions, alterations, amendments or repeals of such regulations shall, unless a shorter time is authorized by the (Secretary of Commerce) Commandant, U. S. Coast Guard, take effect ninety days after their promulgation". Chlorine is now transported on board vessels in individual containers. The capacity of the largest unit container now authorized is one ton of chlorine. For rail transportation 55-ton chlorine tank cars are utilized. The proposed method of transportation which is essentially a bulk movement involves approximately 94 tons of chlorine in each tank or a total of approximately 380 tons per barge. In the past the chlorine industry has been divided in its opinion with reference to the transportation of chlorine in these amounts.

4. It is understood that this proposal to transport chlorine in bulk is a development associated with a defense plant operation, and because of this consideration time is a factor. Assuming the Council looks with favor upon this proposal there are three courses of action by which the request for authorization may be granted.

1. Promulgate emergency authorization and regulations without holding a public hearing.

[fol. 135] 2. Invite interested parties to an informal hearing and if the decision of the Council, following such informal hearing, is favorable promulgate the authority and regulations under the emergency provisions of the statute. The interested parties in this case in addition to the Pittsburgh Plate Glass Company might include Chlorine Institute, Inc., the Bureau of Explosives and Defense Plant Corporation.

3. Hold a public hearing in accordance with the provisions of the statute.

5. Inasmuch as time is an element and the possibility of an unfavorable reaction if the first course is followed, it is suggested that the second course may offer the best solution. Copies of proposed regulations covering the suggested transportation are attached hereto

NORMAN B. HALL
Chief, Port Security Div.

Incl

5. Pittsburgh Plate Glass Co. Dwgs. V-2098, V-2099 (2 sets) 12 Proposed regulations for transportation of liquid chlorine in bulk.

Captain Merrill: I move that Captain Hall's second recommendation be adopted.

Rear Admiral Johnson: I think that is a good recommendation there and if we hold a public hearing it will take considerable time. That's the second one.

[fol. 136] Captain Merrill made the suggestion that we adopt No. 2 of Captain Hall's suggestions. All in favor say aye.

Action: Captain Hall's suggestion approved.

MMC-805

American Merchant Marine Institute, Inc.
11 Broadway—New York.

April 16, 1943

TO MEMBERS OF THE

AMERICAN MERCHANT MARINE INSTITUTE, INC.

Gentlemen:

DISPOSAL OF BALLAST WATER FROM VESSELS

In a communication to the Institute under date of February 19, 1943, Vice Admiral R. R. Waosche, Commandant of the United States Coast Guard, Washington, D.C., re-

quested the co-operation of the shipping industry in the formulation of regulations designed to facilitate the disposal of ballast water from vessels in the interest of eliminating delays interfering (sic) with the war effort.

A committee was formed, composed of representatives of dry cargo and tanker operators, and, as the result of its study of this problem, it was agreed that the enclosed communication, containing the committee's recommendations on the subject, should be transmitted by the Institute to Vice Admiral Waesche today.

You will be kept informed of all important developments [fol. 137] connected with this matter.

Very truly yours,

R. J. BAKER
Secretary.

AMERICAN MERCHANT MARINE INSTITUTE, Inc.
11 Broadway—New York

April 16, 1943

Vice-Admiral R. R. Waesche
Commandant, United States Coast Guard
Washington, D.C.

Disposal of Oil-Contaminated
Ballast Water

Dear Admiral Waesche:

In compliance with your request of February 29, we attach our suggestions covering proposed instructions to be issued by the War and Navy Departments on the above subject.

A number of meetings have been held by our Committee, which consisted of representatives of cargo vessels as well as tankers. After making a thorough investigation

of this subject, all concerned unanimously reached the following two major conclusions:

(End of document.)

[fol. 138]

UNITED STATES OF AMERICA
TREASURY DEPARTMENT
WASHINGTON

Date: Jun 5 1963

ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I certify that the annexed six (6) pages are a true copy of pages 1, 2, 3, 4, 5 and 6 of the Minutes of a Meeting of the Merchant Marine Council (Executive Session) on 3 June 1943, as shown in Vol. 49, Journal of Merchant Marine Council, 1943, on file in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

/s/ LUCILE HENDERSON
Chief, Directives Control and
Distribution Branch
Office of Administrative Services
Treasury Department

UNITED STATES COAST GUARD HEADQUARTERS

MERCHANT MARINE COUNCIL

MINUTES OF A MEETING HELD

3 JUNE, 1943

Pursuant to the authority of R. S. 4405, as amended, (46 U.S.C. 375) and Executive Order 9083, dated 28 [fol. 139] February, 1942, and Reorganization Order dated 1 June, 1942—CO-020, a meeting of the Merchant Marine Council, United States Coast Guard, was duly convened in Room 2020, Coast Guard Headquarters, commencing at 11:15 A.M., 3 June, 1943, there being the following

COUNCIL MEMBERS PRESENT:

REAR ADMIRAL HARVEY F. JOHNSON, USCG, Engineer in Chief, Chairman;

CAPTAIN R. T. MERRILL, USCGR, Assistant to Chief Personnel Officer;

COMMANDER J. A. HIRSCHFIELD, USCG, Vice-Chairman;

COMMANDER R. A. SMYTH, USCGR, Executive Secretary;

COMMANDER H. T. JEWELL, USCG, Chief, Merchant Marine Personnel Division;

COMMANDER L. J. BERNARD, USCGR, Staff of Commandant;

MR. J. R. HARRISON, Chief of Technical Staff, Merchant Marine Inspection;

LEGAL ADVISER:

COMMANDER K. S. HARRISON, USCGR, Chief Counsel.

PRESENT ALSO:

MR. WM. T. BUTLER, Port Security Section; and

LIEUT. COMDR. MERLE A. GULICK, USCGR, Port Security Section.

AGENDA

I. AMENDMENTS

[fol. 140] 1. Emergency Regulations, Subchapter "O", Title 46 (Shipping)

File No. MMC-153.6(a) Additional equipment for lifeboats on seagoing barges of 100 gross tons or over.

File No. MMC-153.6 Change of Headnote.

II. DISCUSSION

File No. MMC-146 Hearing Re—Proposed Amendment Transportation of Chlorine in Bulk

File No. MMC-800-31 Confirmation, equipment approved, Vice Chairman.

PROCEEDINGS AND TRANSACTIONS

EXECUTIVE SESSION

The Council met in Executive session at 11:15 A.M., Thursday, 3 June, 1943.

Rear Admiral Johnson: The picture as I see it is first to determine whether we approve of the fundamental idea of transporting chlorine in bulk. You have all heard the comments and testimonies and I've heard no serious disagreement with it. Do we approve of this idea? Any objections?

Action: The Council unanimously approved the transporting of chlorine in bulk on barges.

Rear Admiral Johnson: I presume there are certain technical details to be worked out. That's a matter of detail for the technical people. I suppose the proper procedure is to check each one of these amendments here and see if there are any comments and then clear up each one.

Captain Merrill: Would it be in order for the Technical Section and those interested to go up and go over the entire thing?

Rear Admiral Johnson: Does that meet with the wishes of the Council?

Action: Captain Merrill's suggestion approved.

Mr. Butler: I would like to call the Council's attention to the first section of the proposed regulation "Liquid chlorine in bulk". This section limits the field of which this approved method of transportation of chlorine may extend. We did that purposely. At the original hearing, prior to promulgation of the regulations, some of the chlorine folks introduced a proposal that we permit bulk transportation of chlorine on board all vessels, regardless of type or size. That proposal was objected to by the Chlorine Institute at that time because commercial vessels would be at piers anywhere in the country. The chlorine would be handled by persons maybe not thoroughly familiar with the dangerous characteristics of chlorine, that concentrations of people would be subject to hazards of chlorine. And after further consideration the proposal was turned down.

[fol.142] Now I want to speak on the question of the barges. The bill which was introduced in Congress did contain an inspection of barges and all vessels that would carry any dangerous articles. In the hearing before the Merchant Marine House Committee, the proposed bill was sent to the Department of Commerce with the suggestion that they get together the interested persons and submit a new bill for their consideration. In the conference which followed the provision to require inspection of vessels not otherwise inspected was thrown out of the proposed bill, and in that form it passed through Congress. So, in view of that I believe it would be very difficult for us to enforce inspection requirement on the barges. However, in my conversations with the Pittsburgh Plate Glass representatives, I was feeling in my mind that they would have no objection to us inspecting the barges. Now that's all

I have to say with regard to the proposed regulation. I see no reason why there should be any stumbling blocks.

Commander Bernard: How would we do it without writing it in the regulations?

Mr. Butler: We could make it a provision of our approval, a provision that the barge be inspected.

Commander Bernard: In other words we approved this type of barge if such barge is inspected every six months or year.

[fol. 143] Rear Admiral Johnson: It seems to me what we are doing, we are approving the transportation of chlorine in bulk and the people who are going to transport it are going to submit plans and specifications. If we are going to approve these plans and specifications, why can't we say it in this regulation?

Commander Bernard: I would suggest that we refer it to Commander Harrison to see whether we have authority to inspect barges in the Regulations.

Action: Rear Admiral Johnson appointed Captain Merrill, Commander Harrison and Mr. Butler on the Inspection Committee.

Rear Admiral Johnson: There are several other technical details to be worked out and on this Technical Committee we will have Mr. Harrison, Commander Hirschfield and Mr. Butler.

TITLE 46—SHIPPING

CHAPTER II—Coast Guard: Inspection and Navigation

Subchapter N—Explosives and Other Dangerous Articles or substances, and Combustible Liquids on Board Vessels.

Part 146—Transportation or Storage of Explosives or Other Dangerous Articles or Substances, and Combustible Liquids on Board Vessels.

Part 146 is amended by adding the following:

[fol. 144] 146.24-15 *Liquid chlorine in bulk.* (a) Liquid chlorine may be transported in bulk on board Class "AA", "BB", or "BC" cargo barges when loaded in Class I fusion-welded steel tanks (pressure vessel type) independent of the structure of the vessel.

(b) Tanks shall be fabricated, constructed and tested in accordance with the applicable provisions of the regulations entitled "Marine Engineering Regulations and Material Specifications" of the U. S. Coast Guard. (46 CFR Parts 50 to 58, Incl.) In addition to other markings required to be shown upon the tank, the water capacity of the tank in pounds shall also be stamped thereon. Plans shall be submitted when requesting approval.

(c) Tanks shall be designed to withstand a minimum working pressure of 300 pounds per square inch. Each tank shall be provided with a manhole nozzle and cover on top of the tank of sufficient diameter to permit access to the interior of the tank and to provide for the proper mounting of venting, loading, unloading and safety valves. Other openings in the tank are prohibited.

(d) A protective housing of approved design shall be provided over the manhole cover and the valves and other openings in said cover, and so constructed as to provide that any leakage of the lading occurring around the cover, valves, gaskets, safety devices, etc., can readily be dis-
[fol. 145] charged into the water alongside the barge.

(e) Independent tanks shall be so fitted on board the barge as to provide sufficient space between the tanks and any fixed structural part of the barge, or in lieu thereof the installation shall be such as to make it practicable to move said tanks for the inspection of the structure of the barge and the tanks.

(f) The design indicative of the manner in which the tank is to be installed, supported, and secured on board the barge shall be approved by the U. S. Coast Guard.

prior to installation. Tanks shall be supported in steel cradles and secured in place with steel bands without the application of any clips or hangers welded or riveted directly to the shell of the tank.

(g) The maximum weight of chlorine loaded into a tank shall not exceed 1.25 times the water capacity of the tank. When more than one tank is installed in a barge, said tanks shall not be interconnected, either directly or by a manifold. When a tank is being filled or discharged no other of the barge's cargo tanks shall be connected to said filling or discharge line. Filling and discharge pipe connections shall be kept disconnected at the cargo tank, except when actually loading or unloading the lading of the cargo tank and the outlet valves on the tank shall, when the filling or discharge line is disconnected, be completely plugged [fol. 146] or blanked off.

(h) Because of the importance of the requirements that tanks shall not be loaded with chlorine in excess of 1.25 times the water capacity (weight basis) the following procedure is required to be followed:

1. The cargo tank to be filled shall be inspected to insure that it is empty and free from foreign matter. After being again made tight the tank shall be evacuated to at least 20 inches of mercury and then loaded with chlorine through a direct pipe line from a shore tank that is mounted on scales so that a predetermined weighted amount of chlorine is loaded into a cargo tank on board the barge. Any vapor vented during the loading operation shall be ignored in calculating the safe carrying capacity of the cargo tank.

2. After the loading operation is completed the vapor above the liquid chlorine shall be analyzed and if it should contain less than 80% chlorine, vapors shall be withdrawn through the vent line until the vapor content in the cargo tank shows at least 80% chlorine. The arsenious oxide or the potassium iodide methods of

analysis shall be used in determining (sic) the percentage [fol. 147] of chlorine in the vapor.

3. Upon completion of the loading of a cargo tank and after filling connections are removed, the cover plate gasket and fittings attached to the cover plate shall be tested for leakage of chlorine. This shall be done by using the aqua ammonia method.

4. The chlorine shall be unloaded by taking advantage of its vapor pressure to force the liquid out of the tank. If desired, compressed air may be used; provided it has been dried by passing it over activated aluminum oxide, silica gel, or other approved drying agent. The compressed air system shall contain a safety valve arranged and set so that the air pressure in the cargo tank cannot exceed 150 pounds per square inch gauge.

5. A diagrammatic sketch of filling and discharge systems shall be submitted when requesting approval. Complete information shall be indicated by legends shown on the sketch.

6. Alternate methods of filling or discharging the lading may be submitted for approval for use.

(j) Cargo tanks shall be examined and retested every [fol. 148] two years in the presence of an inspector of the Coast Guard. The examination shall consist of a thorough internal and external inspection. The hydrostatic test shall be at a pressure of 450 pounds per square inch. The safety valve or valves shall be retested at the time of this biennial inspection. Upon satisfactory conclusion of tests the inspector shall stamp upon the tank the date and other identification necessary to indicate authority for continued use of the cargo tanks and safety valves.

(k) Sea cocks of an approved design capable of sinking the barge in event of an emergency shall be fitted to the barge.

(l) No other kinds of cargo shall be on board the barge at the same time that chlorine in either liquid or vapor form is present in the cargo tank.

(m) The following substance shall not be used as stores on board barges transporting chlorine in bulk; Hydrogen, methane, liquefied petroleum gases, acetylene, ammonia, methyl ether, ethyl phosphine, turpentine, compounds containing such substances, metallic powders, finely divided metals or finely divided organic material.

(n) Repairs to the barge or the cargo tanks, involving the use of welding or burning equipment shall not be undertaken while chlorine in either liquid or vapor form [fol. 149] is present in the tanks.

(p) During the time chlorine cargo is laden in the tanks the barge shall be under constant surveillance. A towing vessel in transporting such barges shall not leave the barge unattended except when the barge is moored to a pier, wharf, dock or other terminal and then only if such facility is provided with normal watchman or guard service. When the barge is at the consignor's or consignee's terminal, watchman or guard service shall be provided by said consignor or consignee. Watchman or guard service normally provided for the terminal shall be deemed sufficient for the purposes of this regulation.

(q) The Interstate Commerce Commission's standard "Dangerous" placard shall be displayed in four locations on the barge when chlorine is laden in the tanks. A placard shall be posted approximately midship on each side and facing outboard. A placard shall be posted at each end of the barge at about the ends of the tanks facing outboard. Racks for mounting such placards will be so arranged as to provide clear visibility and be protected from becoming readily damaged or obscured. After unloading and before a tank or tanks are gas-freed, the placard shall be reversed to show the "Dangerous-Empty" legend.

(R. S. 4472, as amended; 46 U.S.C., 1940 ed., 170).

Commandant

[fol. 150]

UNITED STATES OF AMERICA
TREASURY DEPARTMENT
WASHINGTON

Date: Jun 5 1963

ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I certify that the annexed twelve (12) pages are a true copy of the Minutes of a meeting of the Merchant Marine Council (Hearing) on 3 June 1943, as shown in Vol. 49, Journal of Merchant Marine Council, 1943 on file in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

/s/ LUCILE HENDERSON
Chief, Directives Control and
Distributive Branch
Office of Administrative Services
Treasury Department

I N D E X

Baldwin, Robert T., Chlorine Institute, Inc.	5, 7
Beard, C. H. Carbide Carbon Chemicals Corp.	3
Bernard, L. J., Commander	6
Brown, Frederick E., Chlorine Institute, Inc.	5
[fol. 151]	
Browne, F. W., Solvay Process Co.	3
Bureau of Explosives (Brief)	9, 10
Butler, Wm. T., U.S.C.G., Port Security Section	5, 6

Campbell, H. A., Chief Inspector, Bur. of Explosives ..	9, 10
Carbide Carbon Chemicals Corp.	3
Chemical Warfare Service	4
Chlorine Institute, Inc.	5, 7
Comer, R. O., Solvay Process Co.	3, 7
Cottrell, S., Monsanto Chemical Co.	3
Cummings, S. N., Lt. Col., Chemical Warfare Service ..	4
Defense Plant Corp.	7
Doyle, L. I., Interstate Commerce Commission	5
Haecker, F. W., Petersen & Haecker, Ltd., Western River Panel (Brief)	9
Hall, J. N., Chemicals Division, War Prod. Board	4
Hersh, Max, Defense Plant Corp.	7
Interstate Commerce Commission	5
Johnson, Harvey F., Rear Admiral, Chairman	2, 3, 4, 5, 6, 7, 8
Manufacturing Chemists Assn.	5
McFarland, Arthur, Corps of Eng., U. S. Army	5
Means, Dwight R., Pittsburgh Plate Glass Co.	3, 4, 6
Mississippi Valley Assn. (Brief)	8
Monsanto Chemical Co.	3
[fol. 152]	
Moore, Frank G., Col. Chemical Division, Pittsburgh Plate Glass Co.	2, 3, 4, 5
National Bureau of Standards	6
Office of Defense Transportation	6
Osbourne, Alfred S. Union Barge Line Corp. (Brief) ..	10, 11
Pacelle, Sylvia L., Miss, Mfg. Chemists Assn.	5
Petersen & Haecker, Ltd., (Brief)	9
Pittsburgh Plate Glass Co.	2, 3, 4, 5, 6
Smith, R. M., U. S. Maritime Commission	5
Solvay Process Co., The	3, 7
Streckfus, Jos., Western River Panel (Brief)	8

Union Barge Line Corp., (Brief)	10, 11
U. S. Army	5
U. S. Coast Guard	5, 6
U. S. Maritime Commission	5
Waring, E. G., Office of Defense Transportation	6
War Production Board	4
Weaver, E. R., National Bureau of Standards	6
Western River Panel Members (Briefs)	8, 9
Wright, Donald T., Mississippi Valley Assn. (Brief) ..	8

UNITED STATES COAST GUARD HEADQUARTERS

MERCHANT MARINE COUNCIL

MINUTES OF A MEETING HELD

3 JUNE 1943

[fol. 153]

Pursuant to the authority of R. S. 4405, as amended, (46 U.S.C. 375) the Executive Order 9083, dated 28 February, 1942, and Reorganization Order dated 1 June, 1942—Co-020, a meeting of the Merchant Marine Council, United States Coast Guard, was duly convened in Room 2020, Coast Guard Headquarters, commencing at 10:00 A.M., 3 June, 1943, there being the following

COUNCIL MEMBERS PRESENT:

REAR ADMIRAL HARVEY F. JOHNSON, USCG, Engineer in Chief, Chairman;

CAPTAIN R. T. MERRILL, USCGR, Assistant to Chief Personnel Officer;

Commander J. A. Hirshfield, USCG, Vice Chairman;

Commander R. A. Smyth, USCGR, Executive Secretary;

COMMANDER H. T. JEWELL, USCG, Chief, Merchant Marine Personnel Division;

COMMANDER L. J. BERNARD, USCGR, Staff of Commandant;

Mr. J. R. HARRISON, Chief of Technical Staff, Merchant Marine Inspection;

LEGAL ADVISER:

COMMANDER K. S. HARRISON, USCGR, Chief Counsel

PRESENT ALSO ON BEHALF OF:

UNITED STATES COAST GUARD

Wm. T. Butler, Port Security Section

Lieut. Comdr. Merle A. Gulick, Port Security Section
[fol. 154]

CHEMICAL WARFARE SERVICE

Lt. Col., S. N. Cummings, Washington, D. C.

INTERSTATE COMMERCE COMMISSION

L. I. Doyle, Washington, D. C.

UNITED STATES ARMY

Arthur McFarland, Corps of Engineers

WAR PRODUCTION BOARD

J. N. Hall, Chemicals Division, Washington, D. C.

PITTSBURGH PLATE GLASS COMPANY

Dwight R. Means, Pittsburgh, Pa.

Frank G. Moore, Col. Chemical Division, Grant Bldg.,
Pittsburgh, Pa.

U. S. MARITIME COMMISSION

R. M. Smith, Washington, D. C.

DEFENSE PLANT CORPORATION

Max Hersh, 811 Vermont Ave., N. W., Washington, D. C.

— 1 —

NATIONAL BUREAU OF STANDARDS

E. R. Weaver, Washington, D. C.

MONSANTO CHEMICAL COMPANY

S. Cottrell, 1700 So. 2nd St., St. Louis, Missouri

THE CHLORINE INSTITUTE, INC.

Frederick E. Brown, 50 East 41st St., New York, N. Y.

Robert T. Baldwin, 50 East 41st St., New York, N. Y.

[fol. 155]

THE SOLVAY PROCESS COMPANY

R. O. Comer, Syracuse, New York

F. W. Browne, 40 Rector St., New York, N. Y.

OFFICE OF DEFENSE TRANSPORTATION

E. G. Waring, 4318, I.C.C., Washington, D. C.

MANUFACTURING CHEMISTS ASSOCIATION

Miss Sylvia L. Pacehle, 608 Woodward Bldg., Washington, D. C.

CARBIDE CARBON CHEMICALS CORP.

C. H. Beard, 30 East 42nd St., New York, N. Y.

PROCEEDINGS AND TRANSACTIONS

HEARING

Rear Admiral Johnson: The purpose of this meeting is to arrive at the answer to the problem of transporting chlorine in bulk. At the present time there is no definite rule relative to the transportation by barge except in minor cases.

I am going to ask Mr. Moore of the Pittsburgh Plate Glass Company to open the discussion.

Frank G. Moore: I am Traffic Manager of the Pittsburgh Plate Glass Company.

On May 4, 1943, we addressed to the Commandant of the United States Coast Guard, a request for permission to transport chlorine by tank barge on inland waterways.

There is at present under construction at Natrium, ap-[fol. 156] proximately nine miles north of New Martinsville, West Virginia, and located on the east bank of the Ohio River, a plant for the production of chlorine. It is a project of the Defense Plant Corporation and known as Plancor 394. The company I represent will be the lessee of that plant.

Chlorine is an essential chemical in the production of materials necessary to our war effort. Fortunately, it lends itself readily to water transportation, as this material must be shipped to various points where the consuming plants are located.

— 2 —

Water transportation, in the way we plan to use it, has certain advantages over other means of transportation. It will permit large quantities to be moved at one time. To some destinations it has the advantage of speed of transport, it is economical and it is certainly not a congested artery of transportation.

The seriousness of the tank car situation is familiar to all of us and this water method of transportation of chlorine will relieve the tank car situation, as far as this plant is concerned, to a considerable extent, so that not only is the production of the product in the interest of the war effort, but also the method of transportation here proposed.

We think the amendment to the regulations, as proposed [fol. 157] by the Coast Guard, is reasonable and practicable and we would like to see it made effective. In view of the provisions of the proposed amendment, the plans submitted with our application must be considered tentative. Detailed drawings will be submitted, after the amendment becomes effective, and in accordance with the provisions thereof.

Should the Council care to ask any questions concerning our request, we are prepared to answer them.

Rear Admiral Johnson: Thank you, Mr. Moore.

Mr. Means, have you anything to add?

Dwight R. Means: No, unless there are some questions.

Rear Admiral Johnson: Does any other gentleman wish to speak in support of this method of transportation of chlorine?

F. W. Browne: The regulations that have been proposed by the Coast Guard have been examined by our technical

people, and I wish to go on record on behalf of my company as in favor of them.

Rear Admiral Johnson: Thank you very much.

S. Cottrell: As a representative of the Monsanto Chemical Company of St. Louis, I would like to say we have examined the proposed amendments to the regulations and are in favor of them.

Rear Admiral Johnson: Thank you Mr. Cottrell.

[fol. 158] C. H. Beard: I represent the Carbide Carbon Chemicals Corporation and we are not a producer of chlorine but do consume large quantities of it. We have examined the proposed regulations and have found them satisfactory and recommend their approval.

Rear Admiral Johnson: Thank you Mr. Beard.

R. O. Comer: The change I would suggest is under paragraph (f) on page 2 which excludes the application of any clips or hangers welded or riveted directly to the shell of the tank. Now I don't recall any chlorine container that doesn't have some welding on it in the way of clips or hangers and I would suggest that we be relieved of that hardship and be permitted to weld clips or hangers provided those clips or hangers are stress relieved with the tank. My company in studying the transportation of chlorine in large tanks on barges feels that we should be permitted to provide anchorages of some sort and not be limit-

—3—

ed to things that are just simply supported on the barge without being attached thereto by welding. For instance in this application you will find that your butt straps have clips holding the strap around the end of the tank in position and these clips are welded to the tank.

Rear Admiral Johnson: Thank you Mr. Comer.

J. N. Hall: I handle transportation for the Chemicals [fol. 159] Division of the War Production Board. We have been concerned about adequate transportation for chlorine. We have increased production coming in and the tank car supply is none too good and we trust favorable considera-

tion will be given to anything that will make our transportation problem easier.

Rear Admiral Johnson: Thank you very much. Anyone else?

Frank G. Moore: I noticed from the announcement of this hearing that briefs would be permitted. May I inquire if any briefs have been submitted up to this time?

Rear Admiral Johnson: Yes, we have one that I know of at the present time.

Frank G. Moore: Would it be permissible to ask whether it is favorable to the proposed amendments?

Rear Admiral Johnson: It is favorable with certain detail criticism.

Frank G. Moore: If any briefs are filed may we request permission of the persons filing them to furnish us with copies?

Rear Admiral Johnson: We will furnish you with such information as we see is necessary.

Frank G. Moore: Thank you.

Dwight R. Means: Mr. Comer's opinion on paragraph (f), page 2, is well founded from an engineering construction standpoint. There is no objection to having clips on [fol. 160] tanks if stress relieved. I believe the general impression, at the time that the restriction was put in there, was to make it easier to check up to see whether clips were added after being put into service. Nevertheless in tank car practice, welding of lugs and anchors, etc., are applied to the tank and are stress relieved and we have had very good experience with tanks that are stress relieved and I have no objection to granting Mr. Comer's suggestion. I think maybe that regulation is a little too strict. There's a good argument on both sides.

Rear Admiral Johnson: Thank you. Col. Cummings, have you anything you would like to say?

Lt. Col. S. N. Cummings: The Chemical Warfare Service is not in a position to make recommendations for or against the transportation of chlorine in bulk but merely to state two facts: First, that the production of chlorine is on the

increase; and second, that a shortage of tank cars exists, and it would appear that this, under normal shipping conditions, would be a reasonable method of transportation.

Rear Admiral Johnson: Thank you, sir.

—4—

Arthur McFarland: The Department will interpose no objections to the proposed regulations for the transportation of chlorine in bulk.

Rear Admiral Johnson: Thank you very much.

[fol. 161] L. I. Doyle: The Interstate Commerce Commission has no objection to this form of transportation.

Rear Admiral Johnson: Thank you, sir.

Robert T. Baldwin: The Chlorine Institute has no objections to this proposal, but I want to ask Mr. Moore one question. Are the tanks to be lagged?

Frank G. Moore: The proposed regulations do not provide for lagging, Mr. Baldwin.

Rear Admiral Johnson: Mr. Brown of the Chlorine Institute, do you have anything you want to say?

Frederick E. Brown: I have no further statements to add.

Rear Admiral Johnson: Thank you, sir.

Miss Pacelle of the Manufacturing Chemists Association, have you any statement?

Miss Sylvia L. Pacelle: I'm here just as a representative of the Association, I have nothing to offer.

Rear Admiral Johnson: Thank you. Mr. Smith of the U. S. Maritime Commission.

R. M. Smith: The Commission has no comment to make excepting the clarification on page 2 under (e) by the insertion of "for access" after "sufficient space".

W. T. Butler: The provisions of that regulation follow more or less the similar provisions which we apply to the transportation of inflammable and combustible liquids [fol. 162] in bulk aboard tank vessels. The purpose of the regulation is to provide for inspectors to be able to see in and around the tanks. We do not contemplate that

there shall be sufficient access space provided or clearances to permit work to be carried on in that area. Those tanks further qualify because they can be lifted out from the barge if that becomes necessary to make major repairs to the barge structure itself or to the tank. Does that have any influence on your suggestion?

R. M. Smith: I think the intent is evident but it certainly is open for two different interpretations the way it now stands and it seems to me it should be written so that there is sufficient space provided men to make examination by passing around the objects.

W. T. Butler: We have not carried our practice in that regard as far as you suggest in the past. We have merely tried to provide sufficient free area so that inspectors could at least get in there and see for themselves the entire surface of both the vessel structure and the tank structure and not necessarily to pass along by either the tank or the structure. We may have to do it by going under and then by going above—and between the two he can make a complete and thorough coverage.

—5—

Commander Bernard: I think something should be in [fol. 163] there such as space sufficient for inspectors, or something to that effect.

W. T. Butler: Anyway, it's not major.

Rear Admiral Johnson: Mr. Waring of the Office of Defense Transportation, have you any comments to make?

E. G. Waring: There is a shortage of this particular type of tank car—in fact there is a shortage of all tank cars. But on what is known as the pressure type of tank car, very recently the Office of Defense Transportation made a request to the War Production Board for sufficient material for the construction of 250 additional tank cars. This request was denied. We are making an appeal on it but we doubt very much that we are going to get them. So the supply of tank cars is going to be a very serious situation in months to come.

Rear Admiral Johnson: Thank you, sir. Mr. Weaver of the National Bureau of Standards.

E. R. Weaver: In looking over this material I do not see that there is any limitation on the capacity of an individual unit. It seems to me there ought to be. I'm not prepared to suggest on it but I think the reasons are obvious as something may happen to one of these tanks through an accident or sabotage and we don't want too big an amount of chlorine to go at one time.

Another thing, we go into considerable detail to permit [fol. 164] chlorine to be unloaded by means of compressed air, but there is nothing said about getting the air out of the tanks before reloading. I think if you go into as much detail as you have here you should provide for getting the air out of the tanks.

Dwight R. Means: On the latter question I wish to state that the regulations state that a cargo tank shall be inspected to be sure that it is empty before being loaded. In other words it is necessary to release the air pressure before we put any chlorine in.

On the other question as to the size of the container. We gave that considerable thought and going back over the accident record of chlorine for the last ten years we can't recall any accidents, speaking of course of tank cars 16 and 30 tons single unit, except leaks, safety valve leaks, poor connection to valves and that sort of thing. In other words all the leaks consisted of trouble in that area, so if you pursue that line of reasoning, you would reduce the number of accidents by reducing the number of valves, manhole covers, and by reducing them you would have fewer accidents. The accidents on 30 ton cars have been no more severe in the last ten years than on the 16 ton cars. That's because you fix the leak before the car gets empty. Of course the number of accidents per car has been about the same on 30 ton cars and on 16 ton cars. Consequently [fol. 165] on the basis of per thousand tons of chlorine handled, the actual hazard per ton of chlorine handled has been less on 30 ton cars than on the 16 ton cars. On

the same basis it would be reasonable to expect as you go larger the risk will be reduced. On the other hand even though we assumed the severity would be twice as much on the 30 ton car as on the 16 ton car, we would still come out even but that is, not the case.

—6—

Looking at it in another way—every time an air transport fails, nearly everyone gets killed but we don't argue that should make them smaller, but we keep building them larger. Of course there is a matter of opinion, but after looking it over that's the way it looks to us.

Rear Admiral Johnson: Thank you. Mr. Hersh of Defense Plant Corporation.

Max Hersh: I've nothing to add, I just came to listen.

Rear Admiral Johnson: Mr. Baldwin, I wonder if you would tell the Council the precautions you people take generally in the transportation of chlorine.

Robert T. Baldwin: That's a large subject, sir.

Rear Admiral Johnson: You can shorten it down some, I know.

Robert T. Baldwin: I should say that the regulations [fol. 166] of the Interstate Commerce Commission have been our guide and our necessity. Those regulations, as you know, are backed up by specifications and we do not fail to meet them if for no other reason than there is a section in the regulations which says we are guilty before we are innocent. That is to say, the regulations provide that a duly authorized representative of the shipper must certify on the Bill of Lading that the tank car or container, whatever it may be, has been loaded in accordance with the regulations. That is a tough specification. Speaking for the shipper who is the producer, it is not to his interest to have an accident. We do not have to engage in the question of moral. Chlorine accidents can make the front page in any paper in the United States. I agree substantially in what Mr. Means has stated, that is to say, you cannot be absolutely sure that the quantity of chlorine

can be the measure of the danger. I am very happy to be able to say that the transportation of liquid chlorine by rail is on an increasing scale from year to year. Chlorine is not here just for now—it is here to stay. And with this increased shipping of chlorine the number of accidents does not increase materially, and again I say, we owe that to the Interstate Commerce Commission, and I hope to our own good sense.

Rear Admiral Johnson: How do you handle leaks?

[fol. 167] Robert T. Baldwin: Well, the answer is that we have a gentlemen's agreement, that the producer or shipper nearest to the accident, no matter whose chlorine may be involved, will send at once an expert to the reported accident, and we use airplanes or any other means of quick transportation. These men are reasonably expert—some highly so, and I think without exception we have managed to cure the leak. This is no job for an amateur or well-meaning person. We occasionally get into wrecks, but the stout construction of the car and of the valves, with care in filling the cars, I am happy to say we have comparatively no troubles.

Rear Admiral Johnson: Thank you very much. Is there any other gentleman in the room who has anything further to say in the matter?

R. O. Comer: It has been suggested by the Bureau of Standards' representative that there should be some limit as the size of the tank. Now I think there is a natural advantage of carrying heavy loads on barges. I think in

—7—

the end we will have some 55 ton railroad cars, these are either on order or in operation, I don't know which. That approaches the limit that can be economically carried on rails. On barges we don't have any such limitations. We [fol. 168] can carry heavy weights economically. I think it is the spirit of ICC that we should facilitate commerce—that we shouldn't stand in the way of progress. Therefore, I suggest that we do not limit the size of the tanks.

Rear Admiral Johnson: Thank you very much, Mr. Comer.

Anyone else have anything to say? Any member of the Council have any questions? If no one has anything further to say, we thank you very much for coming down here.

Briefs and comments from others not present at hearing:

June 1, 1943

The Commandant (CMC)
United States Coast Guard
1300 East Street, N.W.
Washington, D. C.

Ref: File CG-MMC 146

Your letter May 27, 1943

Dear Sir:

Sub: Transportation of Liquid
Chlorine in Bulk—by
Water Carriers

Have read request of petitioner, dated May 4th, and proposed amendment that is to be discussed at the Merchant Marine Council hearing on June 3rd.

The flood situation at St. Louis prevents by attending this meeting.

Chlorine is a very important item on the Defense Program, and its movement by water is in the interest of the war [fol. 169] effort. The proposed amendment amply provides for the factor of safety, in my judgment.

In consideration of the above, I favor the proposed amendment and the granting of permission to transport Liquid Chlorine.

Very truly yours

Jos. Streckfus,
Member Western River Panel
St. Louis, Mo.

JS:MB

DISPATCH—021705—DCGO 9TH NAVDIST—ST LOUIS
 REFER COMMANDANT PAREN CMC PAREN. LET-
 TER 27 MAY 43 FILE CG DASH MMC DASH 146 AD-
 DRESSED TO MR. DONALD WRIGHT ST LOUIS MO
 RELATING TO PROPOSAL TO PERMIT CARRIAGE
 OF LIQUID CHLORINE IN BULK IN CERTAIN
 CLASSES OF CARGO BARGES UNDER SPECIFIED
 CONDITIONS X MR. WRIGHT REQUESTED THIS
 OFFICE SEND DISPATCH IN HIS BEHALF STAT-
 ING HE CANNOT BE PRESENT AT MEETING BUT
 APPROVES REPEAT APPROVES CARRIAGE LIQ-
 UID CHLORINE AS PROPOSED

(Donald T. Wright, Mississippi Valley
 Association,
 511 Locust St., St. Louis, Missouri)

—8—

PETERSON & HAECKER, LTD.

Blair, Nebraska

May 31, 1943

Commandant, U. S. Coast Guard
 Washington, D. C.

Reference: CMC CG-MMC 146

[fol. 170] Dear Sir:

This will acknowledge receipt of your letter of May 27, 1943, relative to the hearing which is to be held at Coast Guard Headquarters on June 3 regarding the proposed amendment to regulations governing transportation of explosives on inland rivers.

I have carefully read the request of the Pittsburgh Plate Glass Company of Pittsburgh, Pa., to transport liquid chlorine on the Ohio River and other rivers emptying into the Gulf of Mexico, and also have read the text of the proposed amendment.

I wish to advise that in general I am in favor of granting this request and favor adoption of this proposed amendment. I would favor the adoption of this particular amendment at this time even though a certain amount of additional hazard might be involved.

I further state that because I am unfamiliar with the properties of liquid chlorine and the technique of its handling, I would wish to be excused from technical and detailed comment of the various paragraphs in the proposed amendment.

Yours very truly,

F. W. HAECKER

Member, Western Rivers Panel

[fol. 171]

BUREAU OF EXPLOSIVES

30 Vesey Street
New York, N. Y.

File Number

25-21

25-16-

25-16-242-25

June 1, 1943

The Commandant,
United States Coast Guard
Washington, D. C.

Attention: Rear Admiral Harvey Johnson,
Chairman, Merchant Marine Council

Dear Sir:

Receipt is acknowledged of your letter of May 27, file CG-MMC-146, with enclosures descriptive of a tank barge to be authorized for the transportation of chlorine and also proposed amendment to the regulations covering the transportation or storage of explosives or other dangerous articles or substances, and combustible liquids on board.

vessels which consists mainly of the addition of a new paragraph numbered 146.24-15.

I have reviewed the print and have no exceptions to take to the construction illustrated other than to call attention to the short length of pipe projecting below the venting valve to a point within the tank designated as gas line. Such an arrangement is not permitted on tank cars for the reason

—9—

that once the liquid level rises beyond the bottom of this pipe, as a result of expansion of the lading, liquid will be [fol. 172] ejected should the valve be opened supposedly to vent vapor. This pipe should not be used as a means for determining the maximum load level inasmuch as it is for a fixed length and the level of the liquid for a given weight of material varies with the temperature. Hence such a pipe would only be accurate with the lading always loaded at the same temperature.

The loading diagram shown on the print represents a proper and accurate procedure to be followed to insure that the tank is never loaded in excess of 125% of the water weight capacity of each tank, which water weight capacity should be plainly stenciled on the surface of each tank in a position where it is readily visible to the loader, similar to the marking required on tank car tanks.

I further note that in paragraph 146.24-15(a), Class AA cargo barges are authorized, and as this type of barge calls for loading on deck only, I question its being a satisfactory type for the purpose contemplated. The BB barge seems to be the one represented on blue print V2098-2 and appeals to me as the most desirable design of the three classes mentioned.

I fail to find in the proposed paragraph any reference to the pressure at which the safety valves should be set to open. Possibly this requirement is covered by the regulations referred to in paragraph 146.24-15(b), copy of which I do not have in my files. In any event I recommend that the safety valves be set to open at a

pressure not in excess of 225 pounds per square inch and be of a type which will be gastight at not less than 180 pounds per square inch, the same as required for tank car equipment.

I regret that press of other matters will prevent my being present or represented at the hearing on June 3.

Yours truly,

H. A. CAMPBELL, Chief Inspector.

Copy to Mr. R. T. Baldwin,
Secy., The Chlorine Institute, Inc.,
50 East 41st St., New York, N. Y.

UNION BARGE LINE CORPORATION—
DRAVO BUILDING
PITTSBURGH, PA.

June 2, 1943

Rear Admiral Harvey F. Johnson
Chairman, Merchant Marine Council
United States Coast Guard
Washington, D. C.

Dear Admiral Johnson:

With your letter of May 27th I received copy of proposed amendment to regulations contained in part 146—“Transportation or Storage of Explosives or Other Dangerous Articles or Substances, and Combustible Liquids on Board Vessels”, Subchapter “N”, Chapter II, Title 46 [fol. 174] (Shipping) to permit the transportation of liquid chlorine.

—10—

It will not be possible for me to attend or be represented at announced hearing to be held on June 3rd, but I have today forwarded telegram to you, copy attached, advising that the proposed amendment appears to be entirely adequate and expressing the opinion that river transporta-

tion can handle the prospective movement efficiently and expeditiously, at the same time affording an opportunity to relieve over-burdened railroads of additional transportation demands.

I am happy to know that the interested shippers are anxious to use river transportation and thereby afford it an opportunity to make a further contribution to the war effort. The plan has my complete approval and endorsement.

Yours very truly,

UNION BARGE LINE CORPORATION

ALFRED S. OSBOURNE

Executive Vice President

LONGRAM

June 2, 1943

11:45

REAR ADMIRAL HARVEY F. JOHNSON
CHAIRMAN, MERCHANT MARINE COUNCIL
UNITED STATES COAST GUARD
WASHINGTON, D. C.

REFERENCE YOUR LETTER MAY 27 FILE CG-MMC-[fol. 175] 146, PROPOSED REVISION PART 146 SUB-CHAPTER N CHAPTER TWO TITLE 46 TO PERMIT TRANSPORTATION OF LIQUID CHLORINE IN BULK VIA RIVER BARGE APPEARS TO ENTIRELY ADEQUATE AND WE RECOMMEND ADOPTION. THIS TONNAGE CAN BE HANDLED EFFICIENTLY AND EXPEDITIOUSLY VIA RIVER AND THEREBY RELIEVE OVERBURDENED RAILROADS OF THIS TRAFFIC

UNION BARGE LINE CORPORATION

ALFRED S. OSBOURNE

Executive Vice President :

Meeting adjourned at 10:45 A.M., 3 June, 1943.

UNITED STATES OF AMERICA
TREASURY DEPARTMENT
WASHINGTON

Date: Jun 5 1963

To ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I certify that the annexed five (5) pages are a true copy of pages 1, 8, 9, 10, and 11 of Minutes of Meeting of Merchant Marine Council on 9 June 1943, relative transportation of liquid chlorine in bulk, as shown in Vol. 49, Journal of Merchant Marine Council, 1943 on file in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, [fol. 176] and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

/s/ LUCILE HENDERSON
Chief, Directives Control and
Distributive Branch
Office of Administrative Services
Treasury Department

INDEX

9 June, 1943

800-33

Agenda	2
MMC-43-48 Load Line Manual	11
MMC-141 Manning SS AVALON, WSA Train- ing Vessel	11
MMC-146 Transportation of Chlorine in Bulk	8
MMC-546 Life Raft—Select Steel Products Company	12
MMC-807 Legislation—Marine Inspection Laws —Chief Counsel	12

MMC-808	Hearing—Re Request by War Shipping Administration for revision of Navigation and Inspection Circular No. 20	2
MMC-808-1	Re Contents of Navigation and Inspection Circular No. 30	7

[fol. 177]

UNITED STATES COAST GUARD
HEADQUARTERS
MERCHANT MARINE COUNCIL
MINUTES OF A MEETING HELD
9 JUNE, 1943

Pursuant to the authority of R. S. 4405, as amended, (46 U.S.C. 375) and Executive Order 9083, dated 28 February, 1942, and Reorganization Order dated 1 June, 1942—CO-020, a meeting of the Merchant Marine Council, United States Coast Guard, was duly convened in Room 5202, Coast Guard Headquarters, commencing at 10:00 A.M., 9 June, 1943, there being the following

COUNCIL MEMBERS PRESENT:

REAR ADMIRAL HARVEY F. JOHNSON, USCG, Engineer in Chief, Chairman;

CAPTAIN R. T. MERRILL, USGGR, Assistant to Chief Personnel Officer;

CAPTAIN J. N. HEINER, USCG, Chief, Naval Engineering Division;

CAPTAIN H. C. SHEPHEARD, USCGR, Chief, Merchant Marine Inspection Division;

COMMANDER J. A. HIRSHFIELD, USCG, Vice-Chairman;

COMMANDER H. T. JEWELL, USCG., Chief, Merchant Marine Personnel Division;

COMMANDER R. A. SMYTH, USCGR, Executive Secretary;

COMMANDER L. J. BERNARD, USCGR, Staff of Commandant;

MR. J. R. HARRISON, Chief of Technical Staff, Merchant [fol. 178] Marine Inspection;

LEGAL ADVISER:

CAPTAIN K. S. HARRISON, USCGR, Chief Counsel

PRESENT ALSO:

Mr. H. W. Jackson, War Shipping Administration

Mr. John N. Mason, War Shipping Administration

Mr. F. J. Zito, War Shipping Administration

—1—

MMC-146 TITLE 46—SHIPPING

CHAPTER II—Coast Guard: Inspection and Navigation

Subchapter N—Explosives or Other Dangerous Articles or Substances, and Combustible Liquids on Board Vessels

Part 146—Transportation or Storage of Explosives or Other Dangerous Articles or Substances, and Combustible Liquids on Board Vessels.

Part 146 is amended by adding the following:

146.24-15 *Liquid chlorine in bulk.* (a) Liquid chlorine may be transported in bulk on board Class "AA", "BB", or "BC" cargo barges when loaded in Class I fusion-welded steel tanks (pressure vessel type) independent of the structure of the vessel.

(b)(1) New or existing barges proposed to be used for the transportation of chlorine in bulk shall be approved. [fol. 179] Detail plans showing the design and construction of the barges shall be submitted for such approval. An approved barge shall be maintained in accordance with the provisions of the initial approval, normal wear and wastage excepted. Failure to maintain such physical condition may result in the withdrawal of said approval.

(b)(2) Tanks shall be fabricated, constructed and tested in accordance with the applicable provisions of the regulations entitled "Marine Engineering Regulations and Material Specifications" of the U. S. Coast Guard. (46 CFR Parts 50 to 58, incl.) In addition to other markings required to be shown upon the tank, the water capacity of the tank in pounds shall also be stamped and stenciled thereon. Plans shall be submitted when requesting approval.

(c) Tanks shall be designed for an allowable working pressure of not less than 300 pounds per square inch and the safety valves shall be set at the maximum allowable working pressure of the tank. Each tank shall be provided with a manhole nozzle and cover on top of the tank of sufficient diameter to permit access to the interior of the tank and to provide for the proper mounting of venting, loading, unloading and safety valves. Other openings in the tank are prohibited.

[fol. 180] (d) A protective housing of approved design shall be provided over the manhole cover and the valves and other openings in said cover, and so constructed as to provide that any leakage of the lading occurring around the cover, valves, gaskets, safety devices, etc., can readily be discharged into the water alongside the barge.

(e) Independent tanks shall be so fitted on board the barge as to provide sufficient space for visual inspection around the tanks and any adjacent fixed structural part of the barge, or in lieu thereof the installation shall be such as to make it practicable to move said tanks for the inspection of the structure of the barge and the tanks.

(f) The design indicative of the manner in which the tanks are to be installed, supported, and secured on board

—8—

the barge shall be approved prior to installation. Tanks shall be supported in steel cradles and secured in place by means of base anchorages or steel bands. No appendages

shall be welded to a tank after said tank has been stress relieved.

(g) The maximum weight of chlorine loaded into a tank shall not exceed 1.25 times the fresh water capacity of [fol. 181], the tank. When more than one tank is installed in a barge, said tanks shall not be interconnected, either directly or by a manifold. When a tank is being filled or discharged no other of the barge's cargo tanks shall be connected to said filling or discharge line. Filling and discharge pipe connections shall be kept disconnected at the cargo tank, except when actually loading or unloading the lading of the cargo tank and the outlet valves on the tank shall, when the filling or discharge line is disconnected, be completely plugged or blanked off.

(h) Because of the importance of the requirement that tanks shall not be loaded with chlorine in excess of 1.25 times the water capacity (weight basis) the following procedure is required to be followed:

(1) The cargo tank to be filled shall be inspected to insure that it is empty and free from foreign matter. After being again made tight the tank shall be evacuated to at least 20 inches of mercury and then loaded with chlorine through a direct pipe line from a shore tank that is mounted on scales so that a predetermined weighted amount of chlorine is loaded into a cargo tank on board the barge. Any vapor vented during the loading operation shall be ignored in calculating the safe carrying capacity of the cargo tank.

(2) After the loading operation is completed the vapor above the liquid chlorine shall be analyzed and if it should [fol. 182] contain less than 80% chlorine, vapors shall be withdrawn through the vent line until the vapor content in the cargo tank shows at least 80% chlorine. The arsenious oxide or the potassium iodide methods of analysis shall be used in determining the percentage of chlorine in the vapor.

3. Upon completion of the loading of a cargo tank and after filling connections are removed, the cover plate gasket and fittings attached to the cover plate shall be tested for leakage of chlorine. This shall be done by using the aqua ammonia method.

4. The chlorine shall be unloaded by taking advantage of its vapor pressure to force the liquid out of the tank. If desired, compressed air may be used, provided it has been dried by passing it over activated aluminum oxide, silica gel, or other approved drying agent. The compressed air system shall contain a safety valve arranged and set so that the air pressure in the cargo tank cannot exceed 150 pounds per square inch gauge.

5. A flexible metal connection, of a design to be approved, shall be fitted in each filling discharge, and return pipe line to compensate for movement of the barge during the operation of filling or discharge.

6. A diagrammatic sketch of filling and discharge systems shall be submitted when requesting approval. Complete information shall be indicated by legends shown on [fol. 183] the sketch.

—9—

7. Alternate methods of filling or discharging the lading may be submitted for approval for use.

(j) Cargo tanks shall be examined and retested every two years in the presence of an inspector of the Coast Guard. The examination shall consist of a thorough internal and external inspection. The hydrostatic test shall be at a pressure of 450 pounds per square inch. The safety valve or valves shall be dismantled, overhauled, and reset at the time of this biennial inspection. Upon satisfactory conclusion of tests the inspector shall stamp upon the tank the date and other identification necessary to indicate authority to continued use of the cargo tanks and safety valves.

(k) Sea cocks of an approved design for the purpose of sinking the barge in event of an emergency shall be fitted on Class "BB" or "BC" barges.

(l) No other kinds of cargo shall be on board the barge at the same time that chlorine in either liquid or vapor form is present in the cargo tank.

(m) The following substances shall not be used as stores on board barges transporting chlorine in bulk: Hydrogen, methane, liquefied petroleum gases, acetylene, ammonia, methyl ether, ethyl phosphine, turpentine, compounds containing such substances, metallic powders, finely divided [fol. 184] metals or finely divided organic material.

(n) Repairs involving the use of welding or burning equipment shall not be undertaken on the barge while chlorine in either liquid or vapor form is present in the tanks, except in an emergency involving the safety of the barge.

(o) During the time chlorine cargo is laden in the tanks the barge shall be under constant surveillance. A towing vessel engaged in transporting such barges shall not leave the barge unattended except when the barge is moored at a pier, wharf, dock or other terminal and then only if such facility is provided with watchman or guard service. When the barge is at the consignor's or consignee's terminal, watchman or guard service shall be provided by said consignor or consignee.

(p) The Interstate Commerce Commission's standard "Dangerous" placard shall be displayed in four locations on the barge when chlorine is laden in the tanks. A placard shall be posted approximately midship on each side and facing outboard. A placard shall be posted at each end of the barge at about the ends of the tanks facing outboard. Racks for mounting such placards will be so arranged as to provide clear visibility and be protected from becoming readily damaged or obscured. After unloading

and before a tank or tanks are gasfreed, the placard shall be reversed to show the "Dangerous-Empty" legend.

[fol. 185] (q) The word "approved" when used in Section 146.24-15 shall mean approved by the Commandant, U. S. Coast Guard.

(R.S. 4472, as amended; 46 U.S.C., 1940 ed., 170); (E.O. 9083, February 28, 1942, 7 F.R. 1609).

Commandant

—10—

REPORT

File No. MMC-146
17 June, 1943

Subject: Proposed Amendment to Part 146—Section 146.24-15 "Transportation of Liquid Chlorine in Bulk".

Reference: Minutes MMC—3 June, 1943, pages 1 to 11 inclusive (Hearing) and pages 4 to 6 (Executive Session).

Attachment: Revised draft of subject matter.

The Council having reviewed the revised draft of Section 146.24-15, Part 146, Sub-Chapter N, Chapter II, Title 46—Shipping, is of the opinion that the transportation of liquid chlorine in bulk is feasible and that the procedure to be established governing the safe handling of this product as set forth in attachment is in order. Therefore it is recommended that the Commandant approve the subject amendment.

HARVEY F. JOHNSON, Chairman

[fol. 186] R. A. SMYTH, Executive Secretary

Rear Admiral Johnson: Has the Council been able to digest this regulation relative to the transportation of chlorine?

Action: The proposed amendment approved.

MMC-43-48 Load Lines

Rear Admiral Johnson: The next thing is the committee report on the Load Line Manual.

Commander Smyth: They have made some editorial changes in the wording but not in the text proper.

Commander Bernard: There was one minor change. The manual required a report of inspection to come into Headquarters even though no violation was found. We don't see any reason for that to come into Headquarters.

Action: Tabled.

MMC-141 Manning SS AVALON

Rear Admiral Johnson: We have a letter from Mr. Knight of War Shipping Administration on May 27, 1943, and we have another here now on June 9, 1943, in connection with manning the AVALON. They are running it as a training boat. Once in a while they carry some passengers and some freight and express. They are writing for a complete waiver of any of the requirements relative to the manning of this boat. We made a decision once.

Commander Hirshfield: What was the answer?

[fol. 187] Rear Admiral Johnson: No. That was our decision and now he has asked for a reconsideration of our decision. I really think that consideration should be given to it from both sides as to their story and as to our story. Unless the Council has other ideas let's take the whole thing and review it—all of us.

Action: All members to review the case

IN UNITED STATES DISTRICT COURT

Number 668

MOTION FOR LEAVE TO AMEND LIBEL TO ADD WYANDOTTE
CHEMICAL CORPORATION AS AN ADDITIONAL PARTY RESPON-
DENT—Filed July 16, 1963

Libelant respectfully moves this Court for an order per-
mitting it to amend its libel to add as an additional party
respondent, the parent corporation to the Wyandotte
Transportation Company which has already been sued in
that name and has appeared in this case. This parent cor-
poration, Wyandotte Chemical Corporation, organized
under the laws of the State of Michigan and doing business
within this district with offices at 244 Peachtree Boulevard,
Baton Rouge, Louisiana, was the bareboat or demise char-
[fol. 188] terer of the barge WYCHEM 112 from its wholly
owned subsidiary, Wyandotte Transportation Company,
according to briefs filed by the subsidiary company. Both
the registered title owner and the bareboat charterer or
owner *pro haec vice* should be before the Court, and in
view of the identity of corporate structure no prejudice
would result in suing Wyandotte under both corporate
names.

Louis C. LaCour by United States Attorney, Walter
F. Gemeinhardt.

IN UNITED STATES DISTRICT COURT

Number 667

MOTION OF RESPONDENTS FOR SUMMARY JUDGMENT—
Filed November 13, 1963

Now Into Court come Cargill, Inc., Cargo Carriers, Inc.,
Inland Rivers Transportation Co., Jeffersonville Boat and
Machine Co., Continental Insurance Co., and Travelers
Insurance Co., respondents herein, and move the Court
to enter summary judgment in their favor in accordance
[fol. 189] with the provisions of Rule 58 of the Admiralty

Rules of the Supreme Court of the United States on the ground that the pleadings show that respondents are entitled to a summary judgment as a matter of law.

New Orleans, Louisiana, November 13, 1963.

Phelps, Dunbar, Marks, Claverie & Sims and Taylor,
Porter, Brooks, Fuller & Phillips, By: Tom F.
Phillips, Proctor for Respondents, P. O. Drawer
2471, Baton Rouge, Louisiana.

IN UNITED STATES DISTRICT COURT

Number 667 and Number 668

MINUTE ENTRY OF ORDER JANUARY 8, 1964

WEST, J.

Pre-trial conference was held this day.

It Is Ordered that these cases, Admiralty No. 667 and Admiralty No. 668, be, and they are hereby consolidated for the purpose of determination of pending motions.

It Is Further Ordered that the United States shall have until January 17, 1964, to file briefs in connection with pending motions, and that all respondents shall have an additional ten (10) days thereafter to file reply briefs.

[fol. 190] It Is Further Ordered that on January 28, 1964, all motions pending in these consolidated cases will be considered submitted to the Court for determination on the records as they then stand.

E.G.W.

IN UNITED STATES DISTRICT COURT
MINUTE ENTRY OF ORDER—June 30, 1964

Numbers 667 and 668

WEST, J.

These two cases have been consolidated for disposition by this Court on the various motions for summary judgment filed by all respondents in both cases. After pre-trial conference, it was agreed by all parties in both suits that these matters would be submitted to the Court for decision on briefs to be filed, and that disposition of these cases would await the disposition by the United States Supreme Court of a similar matter presented in the case of United States of America v. Bethlehem Steel Corporation, et al, 319 F. 2d 512, which was before that Court on an application for writ of certiorari.

The Bethlehem Steel case having now been disposed of, and after due consideration by this Court of the records in these cases, together with the extensive briefs and exhibits filed by all counsel.

It Is Ordered that the motions filed by each respondent in both cases for summary judgment in their favor be, and they are hereby Granted, and these suits will be, accord-[fol. 191] ingly, be dismissed at plaintiff's cost.

Reasons

These cases involve the question of whether or not the United States of America may recover damages from the owners and operators of vessels which have been sunk in a navigable stream with or without the negligence of the owners and operators thereof, and subsequently removed from the navigable stream by the United States Government and at its expense.

This Court is unable to find any authority of any kind which would support the proposition that the Government, under these circumstances, has a right to recover the cost of raising such vessels from the owners or operators there-

of. The jurisprudence is clear and unequivocal to the effect that the only right in such a case that the United States Government has to recover its expenses is a right in rem against the vessels themselves. There is no right in personam against the owners of the vessels where the owners of the vessels have abandoned them to the Government. In the instant case, the vessels involved were abandoned and the Government did, in fact, acknowledge and accept the abandonment by attaching, seizing, and selling the vessels and their cargoes when raised from the bottom of the Mississippi River. Thus, the Government had the benefit of and has exercised completely its right, in rem, of recovery [fol. 192] and it has no further right of recovery against the owners of the vessels. *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 S. Ct. 811 (1888); *Loud v. U. S.*, 286 F. 56 (CA 6 1923); *The Manhattan*, 10 F. Supp. 45, Aff. 85 F. 2d 427 (CA 3 1936); *U. S. v. The Bessemer*, 300 U. S. 654, 57 S. Ct. 432; *Zubik v. U. S.*, 190 F. 2d 278 (CA 3 1951); *U. S. v. Zubik*, 295 F. 2d 53 (CA 3 1961); *U. S. v. Bethlehem Steel Corp., et al*, 319 F. 2d 512 (CA 9 1963); 33 U. S. C. A. 409, et seq.

E.G.W.

IN UNITED STATES DISTRICT COURT

Number 667 and Number 668

JUDGMENT—Entered June 30, 1964

For written reasons assigned and filed herein on June 30, 1964:

It Is Ordered, Adjudged and Decreed that there be a judgment herein in favor of all respondents, and against the plaintiff, dismissing these suits at plaintiff's cost.

Baton Rouge, Louisiana, June 30, 1964.

E. Gordon West, United States District Judge.

[fol. 193]

IN UNITED STATES DISTRICT COURT
Numbers 667 and 668

NOTICE OF APPEAL—Filed September 22, 1964

Notice is hereby given that the United States of America, libelant herein, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on June 30, 1964.

Walter F. Gemeinhardt, First Assistant United
States Attorney.

Appellant's Designation of Record for Reproduction—
Filed December 23, 1964 (omitted in printing).

[fol. 196] Counter-Designation of Record on Behalf of
Union Barge Line Corporation, Appellee—Filed December
31, 1964 (omitted in printing).

[fol. 197] Counter-Designation of Record on Behalf of
Wyandotte Transportation Company, Appellee (omitted in
printing).

[fol. 198]

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22148

UNITED STATES OF AMERICA
versus
CARGILL, INC., et al.

UNITED STATES OF AMERICA
versus

2,220,000 POUNDS CHLORINE CARGO EX BARGE WYCHEM 112
AND CONTAINERS IN REM AND UNION CARBIDE CORP., et al.,
in personam.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
February 8, 1966

On this day this cause was called, and after argument by Martin Jacobs, Attorney, Department of Justice for Appellant; and by Lucian Y. Ray for Wyandotte Transportation Co.; George B. Matthews, Attorney for Union Barge Lines; Robert B. Acomb, Jr., Attorney for Union Carbide Corp.; and Tom F. Phillips, Attorney for Cargill, Inc.; appellees, was submitted to the Court..

[fol. 199]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22148

UNITED STATES OF AMERICA, Appellant,
versus

CARGILL, INC., et al., Appellees.

UNITED STATES OF AMERICA, Appellant,
versus

2,220,000 POUNDS CHLORINE CARGO EX BARGE WYCHEM 112
AND CONTAINERS IN REM AND UNION CARBIDE CORP., et al.,
in personam, Appellees.

Appeals from the United States District Court for the
Eastern District of Louisiana

OPINION—July 13, 1966

[fol. 200] Before Rives and Gewin, Circuit Judges, and
Allgood, District Judge.

Gewin, Circuit Judge: This is an appeal from the judgment of the United States District Court for the Eastern District of Louisiana in two admiralty cases involving the question of whether one, who by his alleged acts of neg-

ligence causes a vessel to sink and obstruct navigation in inland waterways, may abandon the vessel without incurring liability for either its removal or cost of removal. The cases were consolidated¹ by the District Court for disposition of the motions for summary judgment filed by all defendants in both cases pursuant to Rule 58(b) of the Supreme Court Admiralty Rules. The motions for summary judgment were granted and the suits dismissed.

In *United States v. Cargill*, two barges, M 65, owned by Jeffersonville Boat and Machine Corp., and L 1, owned by Cargo Carriers, Inc., were moored by a tug at the Cargill fleet mooring at Jackson's Landing, Mile 227.5 above Head of Passes, Baton Rouge, Louisiana, on March 30, 1961. At approximately 3:32 A.M. on March 31, 1961, the super-[fol. 201] tanker *Esso Zurich* bound upriver for Baton Rouge collided with and sunk an unmanned and unlighted barge, which was drifting in the channel. The incident was reported by radio to the barge fleet at Baton Rouge and the two barges, M 65 and L 1, were discovered missing. Although only one barge, believed to be the L 1, was located and showed marks of a collision, both barges, L 1 and M 65, were reported by Cargo Carriers, Inc. as sunk. Cargo Carriers, Inc. then marked the barges for day and night navigation. On April 9, 20, and 26, 1962, Inland Rivers Transportation Co. and Cargo Carriers, Inc. wired the District Engineers that they had abandoned the Barges, L 1 and M 65, and considered the Government the owner of the vessels. The United States by return wires refused

¹ In the case of *United States v. Cargill, et al.*, involving sunken barges L 1 and M 65 the parties defendant are the owners, managers, charterers, and insurers. These barges have not been removed. In the case of *United States v. Wyandotte Transportation Co., et al.*, involving the barge *Wychem 112* the parties defendant are the owner of the chlorine cargo, Union Carbide Corporation; the owner of the *Wychem 112*, Wyandotte Transportation Co.; and the owner of the tugboat which was moving the *Wychem 112*, Union Barge Line Corporation. The chlorine tanks on the *Wychem* had been removed from the water when the litigation commenced.

to accept abandonment and responsibility for marking and removing the wrecks. The United States then brought suit against the owners, managers and charterers of the barges alleging negligence in the condition and mooring of the barges, to have the defendants decreed the owners of the wrecked barges and liable for their removal.

The facts in the second case, *United States v. Wychem*, are somewhat more dramatic. On March 15-17, 1961, the tanks of the barge, Wychem 112, a liquid chlorine barge, were each filled at Geismar, Louisiana, with 555,000 pounds of chlorine gas to be delivered to Union Carbide Corporation at South Charleston, West Virginia. The barge, owned by Wyandotte Transportation Co., was taken in tow on March 21, 1961, by the towboat Eastern, owned and operated by Union Barge Line Corp. The barge, Wychem 112, [fol. 202] was in the fourth and last tier of the four tiers of barges of the tow which kept the chlorine barge under easy observation from the towboat. At Baton Rouge the Wychem 112 was placed in the first tier away from direct observation of the towboat's pilothouse and in a position where it would bear the brunt of the weather. On March 23, 1961, with weather and visibility good but with a strong current the Wychem 112 began to dive and it sank near Vidalia, Louisiana, in the Mississippi River. Effort was made by the owners and operators of the barge in the fall of 1961 to locate and raise the cargo. Two objects were located, either of which could have been the wreck, both under hard packed sand. In November 1961 it was determined that further efforts would be unsuccessful and the owners tendered abandonment to the Government. Thereafter, the Government began a study of the extent and potential danger of the chlorine. In July 1962 technical opinions were issued to the effect that as long as the barge remained in the river it was a potential hazard in that a leak could develop at any time and recommendations were made to raise the chlorine tanks. The Government informed Wyandotte that it accepted abandonment and would proceed

with removal under Section 19 of the Rivers and Harbors Act of 1899.² In view of the Government's opinion that [fol. 203] the chlorine constituted a hazard to public health and safety, the President on October 10, 1962, proclaimed it a major disaster. The tanks were removed at a cost of approximately \$3,081,000 with the concerted effort of civil defense, public health and state authorities.³ The United States then brought suit against the cargo, shippers, carriers and consignee, alleging negligence in the construction, condition and towing of the barge to recover the costs of removal.⁴ Upon motion of the United States, the District Court ordered the sale of the chlorine cargo and containers which had been seized by the marshal at the commencement of the suit and the proceeds paid into court pending final disposition of the litigation.

The question brought before us in both of these cases is whether one may abandon with impunity an allegedly negligently sunk vessel which obstructs navigation or may the Government compel the negligent party to remove it or pay the cost of removal.

Appellant contends that under both the Rivers and Harbors Act of 1899, and under the federal common law of abatement of public nuisances, those responsible for the negligent sinking of a vessel in a navigable channel have

² In the case of the Wychem the record indicates a possible conflict of evidence on the question of whether the Government accepted the abandonment. The trial court concluded that there was an abandonment and that the Government acknowledged and accepted the abandonment by attaching, seizing and selling the vessel, tanks and cargoes when raised from the river. As will be seen later a determination of the question of abandonment is not necessary to our decision.

³ For an interesting account of the sinking of the barge, Wychem 112, and the raising of the chlorine containers, see Fales, "Time Bombs in the Mississippi," *Popular Science Monthly*, April 1963.

Of the total sum spent, \$1,565,000 was for engineering expense. The remaining \$1,516,000 was for public health and safety expense, which included precautions against hazards resulting from a possible rupture of the chlorine tanks during their removal.

[fol. 204] a duty to remove the vessel or reimburse the United States if it conducts the removal operation. It is contended by the appellees that Section 15 of the Rivers and Harbors Act of 1899 gives the owner of a sunken vessel the right to abandon it and that Section 19 of the Act, which gives the Government the right to remove abandoned sunken vessels and proclaims the Government the owner of the vessels and proceeds of their sale, is the sole and exclusive remedy of the United States pertaining to the removal of such vessels from inland waterways.

Congressional action concerning the problem of abandoned craft in the navigable waters of the United States began with the passage of the River and Harbor Act of 1880, 21 Stat. 180 et seq. Section 4, 21 Stat. 197, provided that when a sunken vessel obstructed navigation and was not removed "as soon as practicable," the vessel would be deemed abandoned and subject to removal by the Government. Two years later Congress enlarged the power of the Government granted in the 1880 Act by authorizing the sale of such sunken vessels before their removal.⁴ In 1890 Congress enacted additional legislation⁵ which contained two relevant provisions. Section 8, 26 Stat. 454, provided that if a wrecked vessel remained longer than two months it could be removed by the Government; and Section 10, 26 Stat. 455, prohibited the "creation of any [fol. 205] obstruction, not affirmatively authorized by law, to the navigable capacity of any waters," and authorized the issuance of an injunction to compel the removal of such obstructions. Apparently the thrust of these statutes was to explicitly permit the Government to rid channels of abandoned vessels and also to make it clear that obstruction of navigation was unlawful. This is borne out in *United States v. Hall*, 63 F. 472 (1 Cir. 1894), where

⁴ River and Harbor Act of 1882, 22 Stat. 191, 208-209.

⁵ River and Harbor Act of 1890, 26 Stat. 426 et seq.

the Government brought an action to compel the removal of a wilfully abandoned and sunk vessel which obstructed navigation. The court held that vessels were obstructions within the meaning of Section 10 of the 1890 Act and ordered the defendant to remove them. Thus, the court did not interpret those portions of the various acts, which gave the Government the right to remove and sell abandoned vessels, to mean that an abandoned sunken vessel was not an obstruction prohibited by Section 10 of the Act.

Finally, in 1899 Congress enacted the Rivers and Harbors Act⁶ involved in the present litigation. The purpose of this legislation was to codify the existing laws relating to navigable waters and House Conferees stated it made no essential changes in the existing law.⁷ Since the *Hall* case was part of the existing law, it assumes great importance in making a final decision concerning the application of the various sections of the Act.

[fol. 206] Those sections of the 1899 Act with which we are concerned are as follows:

Section 10:⁸ The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures . . . except on plans recommended by the Chief of Engineer and authorized by the Secretary of the Army;

Section 12:⁹ Every person and every corporation that shall violate any of the provisions of sections 9, 10 and 11 . . . shall be deemed guilty of a misdemeanor,

⁶ 30 Stat. 1121 et seq., as amended, 33 U.S.C. 401 et seq.

⁷ 32 Cong. Rec., 2296-2298; 32 Cong. Rec. pt. 3, 2923.

⁸ 30 Stat. 1151, 33 U.S.C. 403.

⁹ 30 Stat. 1151, 33 U.S.C. 406.

and on conviction thereof shall be punished by a fine not exceeding, \$2,500 nor less than \$500, or by imprisonment not exceeding one year And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction

Section 15:¹⁰ It shall not be lawful to . . . voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; And whenever a vessel, raft, or other craft is wrecked and [fol. 207] sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it . . . and maintain such marks until the sunken craft is removed or abandoned . . . and it shall be the duty of the owner of such sunken craft to commence the immediate removal . . . and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States

Section 16:¹¹ Every person and every corporation that shall violate . . . sections 13, 14 and 15 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding, \$2,500 nor less than \$500, or by imprisonment for not less than 30 days nor more than one year

Section 19:¹² Whenever the navigation of any river . . . shall be obstructed or endangered by any sunken vessel . . . and such obstruction has existed for a longer period than 30 days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel . . . shall be subject to be broken up, removed, sold or otherwise disposed

¹⁰ 30 Stat. 1152, 33 U.S.C. 409.

¹¹ 30 Stat. 1153, 33 U.S.C. 411.

¹² 30 Stat. 1154, 33 U.S.C. 414.

of by the Secretary of the Army at his discretion
 [fol. 208] That any money received from the sale of
 such wreck . . . shall be covered into the Treasury of
 the United States.

It has been argued that the only portions of the Act quoted above which are applicable to sunken vessels are Sections 15, 16 and 19. The obstruction of navigable waters by sunken vessels and the right of the Government to remove these abandoned sunken vessels is given separate and distinct treatment in the Act apart from all other obstructions, thus vessels have been removed from the ambit of Sections 10 and 12. In addition, the earlier Acts which formed the basis of the 1899 Act had no provisions similar to Section 15 of the 1899 Act prohibiting the voluntary and careless sinking of craft in navigable waters, therefore Congress was explicitly treating vessels *in toto* in a section entirely apart from all other prohibitions. The Act further provides a separate criminal penalty for the violation of Section 15 as well as conferring upon the Government all rights of ownership in an abandoned vessel, thus other civil remedies provided by the Act for violation of other sections are inapplicable. Therefore, according to the argument, ignoring Sections 10 and 12 and reading the remaining sections literally, one with impunity can sink and abandon a vessel and incur only the loss of such abandoned vessel plus the possible imposition of the criminal penalties if the sinking occurred voluntarily or carelessly.

[fol. 209] Although the statutory language is subject to an interpretation as the foregoing suggests, it is not atune with the legislative history or logical common sense. The history of the various acts demonstrates an intent of Congress to provide a method of government removal of vessels, not to limit the liability of those causing the sinking. It is illogical to conclude that a vessel is not an obstruction solely because it is given separate treatment. *Hall* bears

this out. When that case was decided, provisions for the abandonment and removal of sunken vessels were in existence, but nevertheless the court found that a vessel was still an obstruction. Also, the introduction of the prohibition of Section 15, "unlawful to voluntarily or carelessly sink" seems more likely to be just an emphatic restatement of the Section 10 prohibition against creating an obstruction, and not an effort to remove sunken vessels from the reach of Section 10. In addition, the imposition of a separate criminal penalty along with giving the Government the right to remove and sell the abandoned vessel does not preclude a vessel from being an obstruction.

It has also been argued that even though a vessel is properly an obstruction, the injunction remedy of Section 12 is not applicable to obstructions but just to structures which are separately listed in the various sections. This we think is reading out of a statute what Congress clearly meant to include. There is no reason to limit the injunction to the items which must be built by approval from the Government [fol. 210] ment to the exclusion of obstructions which is the *primary* prohibition of Section 10. The prohibition is directed to "the creation of *any* obstruction" and is not limited to obstructions which are *created* in a peculiar or particular manner.

In addition, the statutes do not specifically authorize a suit by the Government for the recovery of removal expenses. This we think is implied. It is illogical to reason that the Government having been given the right to remove is penalized for exercising its right, and in order to gain full benefit from the statutory provisions must wait for the slower injunctive process. The right to recover *in rem* from the vessel so removed flows from ownership of the vessel and does not preclude recovery of reasonable removal costs from a tortfeasor.

Our reading of the statutes now needs to be considered in light of the cases decided under the Act. Unfortunately, they are inconclusive and at best have muddied the waters surrounding the sunken vessels.

Several cases, *Loud v. United States*, 286 F. 56 (6 Cir. 1923); *The Manhattan*, 10 F. Supp. 45 (D.C. Pa. 1935), aff'd. 85 F.2d 427 (3 Cir. 1935), cert. denied, sub nom. *United States v. The Bessemer*, 300 U.S. 654 (1937); *In re Eastern Transportation Co.*, 102 F. Supp. 913 (D.C. Md.), aff'd. sub nom. *Ottenheimer v. Whitaker*, 198 F.2d 289 (4 Cir. 1952); *United States v. Bethlehem Steel Corp. (The Texmar)*, 319 F.2d 512 (9 Cir. 1963), have concluded that [fol. 211] the Sections 10 and 12 are not applicable to sunken vessels. In *Loud* the United States brought an action to recover the amount expended in straightening a sunken vessel in a navigable channel. The sunken barge, owned by Loud, had collided with an abutment and sunk, thus obstructing navigation. The Government after straightening the vessel surrendered it to the owner. The court denied recovery and held that the United States only had a claim against the vessel which it lost by voluntarily surrendering ownership. Significant here is the fact that there were no claims of negligence on the part of Loud, therefore, it may be assumed the collision and sinking were neither the result of wilfulness nor carelessness on the part of Loud. That being true, the case is correctly decided in that Loud has not violated any provision of the Act subjecting him to liability. In the *Manhattan* the Government raised its sunken dredge and sought reimbursement from those responsible for its sinking. The court in deciding against the Government considered only the sections of the Act pertaining to the sinking and abandonment of the vessel, and found nothing in the statute allowing the Government to recover from a tortfeasor. The *Ottenheimer* case presented the court with the question of whether the owner of floating barges could abandon them in navigable waters and allow them to sink. The court concluded that despite the forceful opinion of the *Hall* case a vessel was not a structure within the meaning of Sections 10 and 12. Hence it decided the case under Section 15 and concluded that an owner could only abandon a vessel by virtue of "fire, storm, col-[fol. 212] lision or unforeseen unseaworthiness." Since

this abandonment was wilful and not one of the above, the court ordered the owners to remove the floating barge. In the *Texmar* case, which is factually similar to the present case, the Government raised an allegedly negligently sunk vessel and sought reimbursement. While admitting the statutes were confusing, the court concluded that sunk vessels were treated outside Section 10; and since Section 15 limited itself to criminal penalties and Section 19 gave the Government the right to recover against the vessel, the Government had no claim. The dissent in the *Texmar* case took the other approach. The removal provisions are not a substitute for Section 10 but the prohibition of Section 10 applies also to vessels.

The line of reasoning in the *Texmar* dissent is demonstrated in several cases, *United States v. Bridgeport Towing Line Inc.*, 15 F.2d 240 (D.C. Conn. 1926); *United States v. Wilson*, 235 F.2d 251 (2 Cir. 1956); *United States v. Zubick*, 295 F.2d 53 (3 Cir. 1961). In *Bridgeport* a craft, during salvage operations slipped and sank due to the negligence of the defendants, resulting in an obstruction to navigable waters. The Government sued for an injunction under Section 12 to compel the owners to remove the craft. The court, while holding that the provisions of Sections 10 and 12 are applicable to the facts presented, denied relief on the ground that the prohibition against the creation of obstructions meant only a prohibition against the wilful, [fol. 213] not negligent, creation of navigable obstructions. The *Wilson* case held that a sunken barge was properly an obstruction under Section 10 but the injunction provision of Section 12 only applied to structures and not to obstructions. In *Zubick* the court treated the Section 12 injunctive power and the provisions of Section 19, giving the Government the right to remove sunken vessels, as an election. And since the Government chose to raise the vessel, its rights were limited to the vessel itself or to the proceeds from the sale of such vessel.

Three cases, *United States v. Bethlehem*, 235 F. Supp. 569 (D.C. Md. 1964); *United States v. Perma Paving Co.*,

332 F.2d 754 (2 Cir. 1964); *United States v. Republic Steel Corp.*, 362 U.S. 482, 80 S.Ct. 884, 4 L.ed.2d 903 (1960), although not dealing with the problem of sunken vessels, shed light on whether the Section 12 injunction is properly applicable to obstructions. In *Bethlehem* the defendant deliberately grounded a floating drydock in navigable waters. The court held that the drydock was not a vessel, but an obstruction under Section 10, and thereby granted an injunction for its removal. In *Perma* the defendant put excessive weight on his property causing silt to move into the bed of a stream causing obstruction to navigation. The Government sought reimbursement for dredging the channel. The court recognized the application of the injunction power and concluded that there was no basis for reading the statute narrowly; and since the Government could have [fol. 214] compelled *Perma* to remove the silt, the Government could seek reimbursement for its dredging operations. In *Republic Steel* the Government sought to compel the removal of deposits. The Supreme Court held there to be an obstruction and granted an injunction not by Section 12 but solely under Section 10. The prohibition of an act carried with it the inherent power to enjoin the act.

These cases not only demonstrate an approach far from uniform but illustrate the myriad interpretations of the statutes in question. Faced with this array of diversified opinion we are necessarily thrown back to the legislative history and the wording of the statutes themselves, which leads us to conclude that those cases finding a vessel an obstruction under Section 10 and thus subject to the injunction power of Section 12 are to be given the greatest weight.

Our reading of the statute is identical with an administrative interpretation¹³ adopted by the Army Corps of Engineers which provides in part:

“ . . . a person who wilfully or negligently permits a vessel to sink in navigable water of the United States

¹³ 33 C.F.R. 209.410 (1962), first published at 11 Fed. Reg. 177 A-828 (1946).

may not relieve himself from all liability by merely abandoning the wreck. He may be found guilty of a misdemeanor and punished by fine, imprisonment, or both, and in addition may have his license revoked or [fol. 215] suspended. He may also be compelled to remove the wreck as a public nuisance or pay for its removal."

This is not "an authorized effort to administratively improve the statute"¹⁴ but a clear and precise statement of what the statute actually says.

Appellees point out that Congress must think it is required to raise vessels from navigable waters for it appropriates funds for "removing sunken vessels or craft obstructing or endangering navigation." 31 U.S.C. 725 a (b) (14). This is certainly no support for the right of an owner to abandon his vessel with impunity because the Government must always bear removal costs of innocent owners; and also the Government might wish to remove a negligently or wilfully sunk vessel instead of enforcing the injunctive process. No doubt there have been cases in the past, and most likely others will arise in the future, when removal by the Government would be the preferred remedy in order to avoid the delays inherent in litigation seeking an injunction. In such a situation the Government would need appropriations for the removal even though it could get reimbursed.

Therefore, we believe the correct reading of the statute allows only an innocent owner to abandon his ship and that a negligent party must raise the vessel or pay for its removal. Although appellees point out that a decision imposing liability on them catches them unprepared for such an occurrence, such an argument seems inappropriate as a means of avoiding the consequences of one's negligence.

A vast inland waterway such as we have under consideration here, the Mississippi River, is a national high-

¹⁴ The Texmar at 520.

way in which all of the people have an interest.¹⁵ It is a national asset. Such streams rarely, if ever, come to us in useful form in their natural state when measured by the standards and requirements of present day commerce. Precisely for this reason the national Government, and in many cases state and local governments as well, have spent vast sums in successful research and efforts to improve, prepare and maintain them as natural resources. The national character of this natural resource gives the Government an essential federal interest in it as a national artery of commerce.

It is not reasonable, we conclude, for the national Government to go to such trouble and expense to prepare, preserve and maintain this river, allow its use to be impaired seriously by those who use it most, and then permit such users to insulate themselves from liability for proved negligence. Moreover, our interpretation of the statute is not unusual in view of the wide-spread national interest in its subject matter. For example, in dealing with anti-trust legislation involving statutes of remarkable brevity [fol. 217] but of wide-spread application, Chief Justice Hughes stated that the Sherman Antitrust Act, "as a charter of freedom, * * * has a generality and adaptability comparable to that found to be desirable in constitutional provisions. * * * The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-360 (1933). See also *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911); Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), p. 5 et seq.

While it is true that the statutes under consideration could have been drafted with greater clarity and more de-

¹⁵ See, for example, 33 U.S.C. § 10:

"All the navigable rivers and waters in the former territories of Orleans and Louisiana shall be and forever remain public highways."

tail, it is clear to us that the Congressional intent underlying the Rivers and Harbors Act to prevent interferences with and obstructions to navigable streams is so compelling and fundamental as to require the inference that appropriate civil remedies may be applied to those responsible for such interferences and obstructions. See *United States v. Republic Steel, supra*.

Nor do we consider the reasoning which we have applied to be at variance with fundamental concepts of the law of negligence. In 1897 Mr. Justice Holmes stated:

"I think that the law regards the infliction of temporal damage by a responsible person as actionable, if under [fol. 218] the circumstances known to him the danger of his act is manifest according to common experience, or according to his own experience if it is more than common, except in cases where upon special grounds of policy the law refuses to protect the plaintiff or grants a privilege to the defendant."

"The Path of the Law" (address delivered in 1897); reprinted in "Jurisprudence in Action", p. 276; "A Treasury of Legal Quotations" (Cook 1961), p. 131. In the circumstances of this case the inherent, imminent and impending danger of the presence of 2,220,000 pounds of deadly chlorine gas in the channel of the Mississippi River, and the obstruction resulting from the presence of the sunken barges L 1 and M 65, were certainly and positively clear to these appellees who were engaged in the "more than common experience" of using the river. We are unable to find any special grounds of policy upon which to refuse relief to the Government or to grant a special privilege or exemption to the defendants if it is proved that their negligence caused the sinking of the barges.

Since appellees liability stems from their allegedly negligent acts regarding the sinking of the various vessels, it must be determined whether the alleged acts constituted negligence on the part of any of the defendants. If the de-

defendants in the *Cargill* case are found to be negligent, the court should order the defendant to raise the barges, M 65 [fol. 219] and L 1, from the navigable waters of the Mississippi River or bear the reasonable cost of their removal. If negligence is found on the part of the defendants in *Wychem*, the damages to which the Government is entitled are those reasonably flowing from appellee's negligence and subsequent failure to raise the vessel. Since the Government properly could have demanded the removal, the cost of removal by the Government is to be given consideration in fixing damages but is not conclusive.

Since we have properly found liability under the Act, it is not necessary to deal with the contentions of the appellant that under the federal common law the appellees are liable for the abatement of a public nuisance.

Judgment reversed and the cases are remanded for a determination of whether the acts of the various defendants constituted negligence.

Reversed and Remanded.

[fol. 221]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22148

D. C. Docket No. 667 and 668—Admiralty

UNITED STATES OF AMERICA, Appellant,

versus

CARGILL, INC., et al., Appellees.

UNITED STATES OF AMERICA, Appellant,

versus

2,200,000 POUNDS CHLORINE CARGO EX BARGE WYCHEM 112
AND CONTAINERS IN REM AND UNION CARBIDE CORP., et al.,
IN PERSONAM, Appellees.APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANABefore Rives and Gewin, Circuit Judges, and Allgood,
District Judge.

JUDGMENT—July 13, 1966

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for a determination of whether the acts of the various defendants constituted negligence.

Issued as Mandate:

[fol. 222]

[File-endorsement omitted]

[fol. 225]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22,148

[Title omitted]

PETITION FOR REHEARING EN BANC—Filed August 2, 1966

Wyandotte Transportation Company, Union Barge Line Corporation, Cargill, Inc., Cargo Carriers, Inc., Inland Rivers Transportation Co., Jeffersonville Boat & Machine [fol. 226] Co., Continental Insurance Co. and Travelers Insurance Co., appellees, through their undersigned attorneys, petition the Court for a rehearing *en banc* of its opinion dated July 13, 1966, reversing and remanding the judgment of the District Court for the following reasons:

(1) The issue decided by this Court is unusually important to the public in general, and in particular to the maritime industry, in that it creates a wholly new area of liability with large monetary exposures.

(2) The opinion of the Court is conflict with the opinion of the Court of Appeals for the Second Circuit in *United States vs. Wilson* (1956) 235 F. 2d 251 which holds that the removal of a sunken vessel may not be enforced pursuant to injunctive process under § 12 of the Rivers & Harbors Act of 1899, and with the opinions of the Third Circuit in *The Manhattan* (1935) 85 F. 2d 427 and *United States vs. Zubik* (1961) 295 F. 2d 53 and the opinion of the Ninth Circuit in *The Texmar* (1963) 319 F. 2d 512 all of which hold that the Government has no *in personam* right to recover removal expenses.

(3) The Court failed to consider whether the funds expended by the Government to raise WYCHEM 112 under the Disaster Relief Act, 42 U.S.C.A. § 1885 *et seq.* are recoverable from appellees.

Petitioners request that they be afforded the opportunity of oral argument should this petition be granted.

Petitioners append hereto a brief in support of this petition.

Wherefore, petitioners pray that they be granted a rehearing *en banc*; that this Court's opinion of July 13, [fol. 227] 1966 be recalled and set aside; and that the judgment of the District Court be affirmed.

McCreary, Hinslea & Ray, 860 Union Commerce Building, Cleveland, Ohio;

Terriberry, Rault, Carroll, Yancey & Farrell, 825 Whitney Bank Building, New Orleans, Louisiana,

By: Benjamin Yancey;
Attorneys for Wyandotte Transportation Company.

Lemle & Kelleher, 1836 National Bank of Commerce Building, New Orleans, Louisiana, By: Geo. B. Matthews, Attorneys for Union Barge Line Corporation.

Taylor, Porter, Brooks, Fuller & Phillips, Louisiana National Bank Building, Baton Rouge, Louisiana;

Phelps, Dunbar, Marks, Claverie & Sims, 420 Hibernia Bank Building, New Orleans, Louisiana,
By: J. Barbee Winston;

Attorneys for Cargill, Inc., Cargo Carriers, Inc., Inland Rivers Transportation Co., Jeffersonville Boat & Machine Co., Continental Insurance Co. and Travelers Insurance Co.

[fol 228]

Certificate

The undersigned attorneys for petitioners do hereby certify that the foregoing petition is presented in good faith and not for delay, and that copies of the petition and brief in support thereof have been served on Louis A. LaCour, Esq., United States Attorney, Alan S. Rosenthal, Esq. and Martin Jacobs, Esq., attorneys, Department of Justice, Washington, D. C. and on Messrs. Jones, Walker, Waechter, Poitevent, Carrere & Denegre, 225 Baronne Street, New Orleans, Louisiana, attorneys for Union Carbide Corporation, by depositing same in the United States mail, postage prepaid, addressed to them at their respective offices.

New Orleans, Louisiana, August , 1966.

Benjamin Yancey, Attorney for Wyandotte Transportation Company.

Geo. B. Matthews, Attorney for Union Barge Line Corporation.

J. Barbee Winston, Attorney for Cargill, Inc., Cargo Carriers, Inc., Inland Rivers Transportation Co., Jeffersonville Boat & Machine Co., Continental Insurance Co. and Travelers Insurance Co.

[fol. 242]

IN THE UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 22,148

[Title omitted]

PETITION FOR REHEARING EN BANC—Filed August 2, 1966

[fol. 243] To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

Union Carbide, one of the appellees herein, respectfully petitions for rehearing en banc pursuant to Rule 25(a) and submits to the Court and maintains that the decision of this Court dated July 13, 1966 is in error under the facts and the law and the opinion decides an unusually important and novel question contrary to the uniformity of jurisprudence which, contrary to the view of this Court has held that where an owner of a sunken vessel abandons her in accordance with the provisions of the *wreck* statute there is no liability by reason of such abandonment other than the forfeiture of the sunken and abandoned vessel and her cargo even though and notwithstanding that other liability has been alleged and asserted to the Court on the ground that the sinking of such vessel was due to negligence at or prior to the time of such sinking by one, more or all of the owners of such sunken vessel and those in charge, care, custody and control of her at or prior to the time of her sinking. However, even under the view of this Court, Union Carbide shows that neither the government nor any other party in this case has alleged that Union Carbide was in any manner whatsoever negligent and the factual affidavit of Union Carbide remains un-

[fol. 241]

[File endorsement omitted]

answered and unquestioned in this record. Union Carbide respectfully submits and maintains: (a) that the District Court was correct in granting Union Carbide's motion for summary judgment, certainly as to it, because there is no [fol. 244] triable issue of fact with respect to Union Carbide (all facts contained in the record before this Court conclusively establish that Union Carbide was not and could not be found to be negligent in any way whatsoever) and (b) that the record is more than adequate in respect to the position of Union Carbide in this matter to support not only a grant by the District Court and this Honorable Court of Appeals of its motion for summary judgment but also to support a grant by both the District Court and this Honorable Court of Appeals of Union Carbide's separate and distinct motion to dismiss the libel for failure to state a cause of action against Union Carbide.

Accordingly, Union Carbide requests that this Court order a rehearing en banc in this case and that the judgment of the District Court in its favor should be affirmed either or both on the motion of Union Carbide for summary judgment or its motion for dismissal on the failure of the libelant to state a cause of action against Union Carbide.

Union Carbide respectfully requests that this Honorable Court grant an opportunity for oral argument in this matter to the Court en banc.

George Denegre and Robert B. Acomb, Jr. of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, 225 Baronne Street, New Orleans, Louisiana, Attorneys for Union Carbide Corporation.

[fol. 245]

Certificate

I certify that the foregoing petition is filed in good faith and not for the purpose of delay.

Robert B. Acomb, Jr.

[fol. 256]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 22148

UNITED STATES OF AMERICA, Appellant,
versus
CARGILL, INC., ET AL., Appellees

UNITED STATES OF AMERICA, Appellant,
versus

2,220,000 POUNDS CHLORINE CARGO EX BARGE WYCHEM 112
AND CONTAINERS, IN REM AND UNION CARBIDE CORP.,
ET AL., IN PERSONAM, Appellees.

Appeals from the United States District Court for the
Eastern District of Louisiana.

OPINION ON PETITION FOR REHEARING—September 12, 1966
[fol. 257] Before Rives and Gewin, Circuit Judges, and
Allgood, District Judge.

Per Curiam: Upon consideration of the petition for rehearing by Union Carbide Corporation, we conclude that there are no allegations or proof of negligence on the part of Union Carbide Corporation and that the summary judgment of the District Court in its favor ordering dismissal of the libel against it should be and the same hereby is Affirmed. The opinion, judgment and mandate of this Court are hereby modified and amended in accordance with this order.

It is further Ordered that the petition for rehearing by all of the other parties in said cause be, and the same is hereby Denied.

[fol. 258]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22148

D. C. Docket Nos. 667 and 668—Admiralty
UNITED STATES OF AMERICA, Appellant,

versus

CARGILL, INC., ET AL., Appellees.

UNITED STATES OF AMERICA, Appellant,

versus

2,200,000 POUNDS CHLORINE CARGO EX BARGE WYCHEM 112
AND CONTAINERS IN REM AND UNION CARBIDE CORP.,
ET AL., IN PERSONAM, Appellees.

Appeals from the United States District Court for the
Eastern District of Louisiana.

Before Rives and Gewin, Circuit Judges, and Allgood,
District Judge.

JUDGMENT—September 12, 1966

This cause came on to be heard on the Petitions for
Rehearing filed on August 2, 1966;

On Consideration Whereof, It is now here ordered and
adjudged that the opinion, judgment and mandate of this
Court are hereby modified and amended in accordance with
this Court's opinion on rehearing; and that the judgment
of the said District Court ordering dismissal of the libel

against appellee, Union Carbide Corp., is hereby, affirmed.
Issued as Mandate:

[fol. 259] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 260]

SUPREME COURT OF THE UNITED STATES

No. 838—October Term, 1966

WYANDOTTE TRANSPORTATION COMPANY, ET AL., Petitioners,

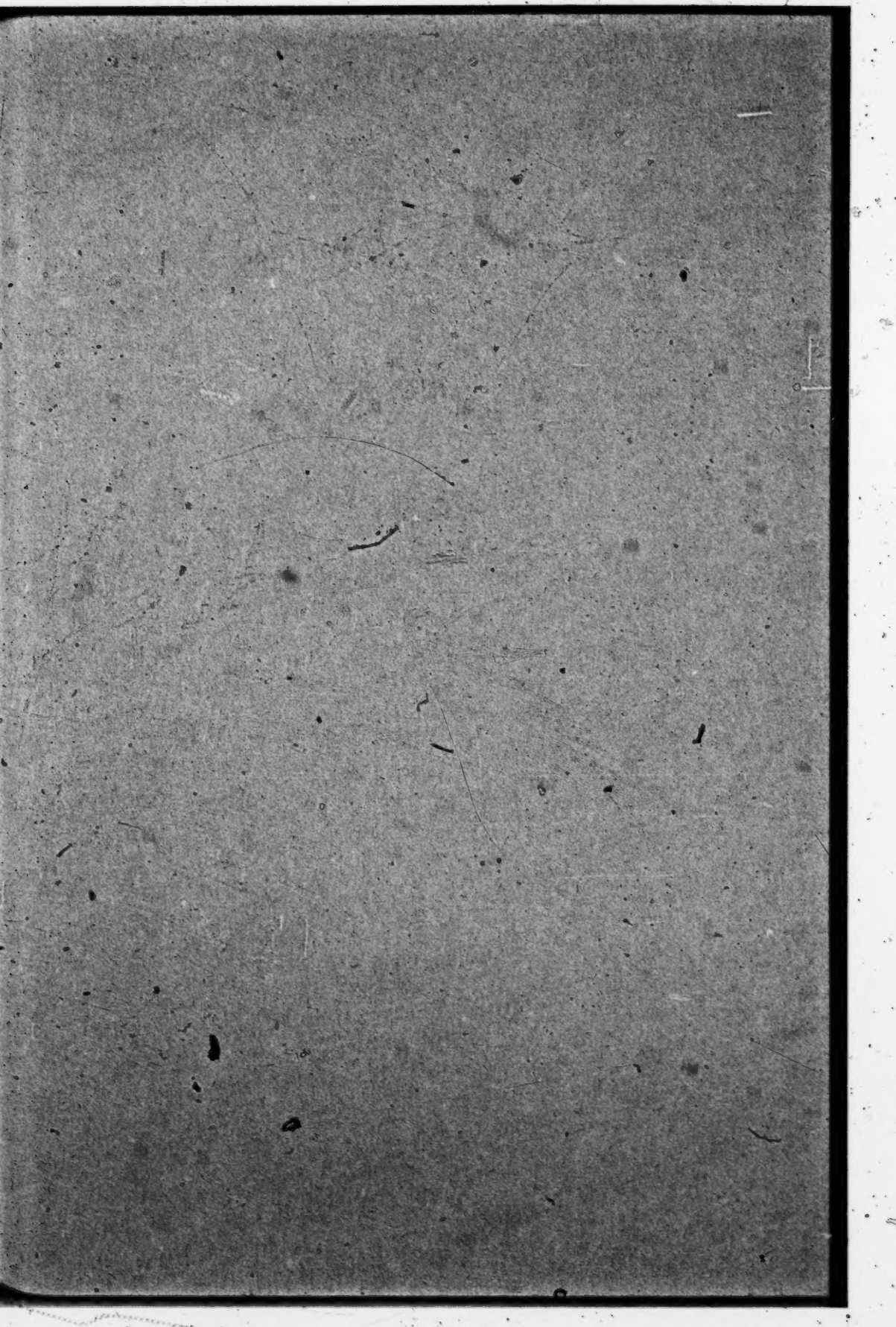
v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—February 13, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~838~~ 31

**WYANDOTTE TRANSPORTATION COMPANY,
UNION BARGE LINE CORPORATION and
CARGILL, INC., et al.,**

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit.**

**LUCIAN Y. RAY,
WILLIAM D. CARLE III of
McCREARY, HINSLEA & RAY,
1550 Union Commerce Building,
Cleveland, Ohio,**

and

**BENJAMIN W. YANCEY,
ALFRED M. FARRELL, Jr. of
TERRIBERRY, RAULT, CARROLL,
YANCEY & FARRELL,**

**2141 International Trade
Mart Building,**

New Orleans, Louisiana,

**Attorneys for Wyandotte
Transportation
Company.**

(Other Counsel on Inside of Cover.)

GEORGE E. MATTHEWS of
LEWIS & KELLAM

1035 National Bank Building,

New Orleans, Louisiana,

Attorneys for Union Barge
Line Corporation.

THOMAS F. PHILLIPS of

TAYLOR, PORTER, BROOKS,

FULLER & PHILLIPS,

Louisiana National Bank
Building,

Baton Rouge 1, Louisiana,

and

J. BARRETT WINSTON of

PHILIPS, DUNBAR, MARKS,

CLAVEN & SILVER,

Hibernia Building,

New Orleans, Louisiana,

Attorneys for Cargill,
Inc., et al.

TABLE OF CONTENTS.

Opinions Below -----	2
Jurisdiction -----	2
Questions Presented -----	2
Statutes Involved -----	3
Statement of the Case -----	3
Reasons for Granting the Writ -----	7
Conclusion -----	14
Appendix:	
A. Order and Reasons of District Court -----	16
Judgment of District Court -----	18
B. Opinion of the United States Court of Appeals for the Fifth Circuit -----	18
C. Opinion and Judgment of Court of Appeals on Petition for Rehearing -----	35
D. Statutes Involved -----	36

TABLE OF AUTHORITIES.

Cases.

<i>China Union Lines, Ltd. v. A. O. Andersen and Co.</i> (CA 5, 1966), 364 F. (2d) 769	7, 9
<i>Manhattan, The</i> , 10 F. Supp. 45, affirmed 85 F. (2d) 437, cert. denied 300 U. S. 654	7
<i>Palmyra, Village of, v. G. S. Warren, et al.</i> , 114 Ill. App. 562	13
<i>Texmar, The</i> , 319 F. (2d) 512 (CA 9, 1963, cert. de- nied 375 U. S. 966)	7, 8, 14
<i>Thornton v. The Livingston Rae</i> (D. C. N. Y. 1950), 90 F. Supp. 342	13
<i>United States v. Hall</i> , 63 Fed. 472 (CA 1, 1894)	12
<i>United States v. Wilson</i> (CA 2, 1956), 235 F. (2d) 251	10-11, 12
<i>United States v. Zubik</i> , 295 F. (2d) 53 (CA 3, 1961)	7, 8
<i>Willamette Iron Bridge Co. v. Hatch</i> , 125 U. S. 1	13

Statutes.

28 U. S. C. 1254(1)	2
Rivers and Harbors Act of March 3, 1899, 30 Stat. 1151, et seq., as amended:	
Sec. 9 (33 U. S. C. 401)	12
Sec. 10 (33 U. S. C. 403)	2, 3, 10, 11, 12, 36
Sec. 11 (33 U. S. C. 404)	12
Sec. 12 (33 U. S. C. 406)	2, 3, 10, 11, 12, 36
Sec. 15 (33 U. S. C. 409)	3, 37
Sec. 16 (33 U. S. C. 411 and 412)	3, 38
Sec. 19 (33 U. S. C. 414)	3, 4, 39
Sec. 20 (33 U. S. C. 415)	3, 40
Disaster Relief Act, Public Law 875, 81st Congress, 42 U. S. C. § 1855, et seq.	2, 3, 13

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. _____

WYANDOTTE TRANSPORTATION COMPANY,
UNION BARGE LINE CORPORATION and
CARGILL, INC., et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fifth Circuit.

Come now Wyandotte Transportation Company, Union Barge Line Corporation, Cargill, Inc., Inland Rivers Transportation Co., Jeffersonville Boat & Machine Co., Continental Insurance Co., and Travelers Insurance Company and respectfully pray that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered herein on July 13, 1966, reversing a judgment of the United States District Court for the Eastern District of Louisiana in favor of respondents, and the order of the same Court denying a rehearing *en banc*, entered herein on September 12, 1966.

OPINIONS BELOW.

The opinion of the District Court, entered herein on June 30, 1964, is unreported. The opinion of the United States Court of Appeals for the Fifth Circuit is unreported. Both opinions are reproduced in the Appendix hereto. The opinion and the order denying rehearing are unreported, and are reproduced in the Appendix.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 13, 1966. A petition for rehearing *en banc* was timely filed and thereafter the said Court entered its order denying rehearing, on September 12, 1966. The mandate has been stayed pending the filing of this application.

The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1254(1).

QUESTIONS PRESENTED.

1. Whether a vessel owner or other party who by his negligence causes a vessel to sink and become an obstruction to navigation is liable *in personam* to the United States for the cost incurred by the United States in removing the obstruction.

2. Whether a sunken vessel constitutes an "obstruction" to navigation under Section 10 of the Rivers and Harbors Act of 1899 (33 U. S. C. A. Section 403), the removal of which could have been enforced by injunction pursuant to the provisions of Section 12 of the Rivers and Harbors Act (33 U. S. C. A. Section 406).

3. Whether the funds expended by the Government to raise Wychem 112, under the Disaster Relief Act, 42 U. S. C. A. § 1885, *et seq.*, are recoverable from the petitioners.

STATUTES INVOLVED.

The statutes involved are material parts of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1151, *et seq.*, as amended, 33 U. S. C. 401, *et seq.*, consisting of § 10, 33 U. S. C. 403; § 12, 33 U. S. C. 406; § 15, 33 U. S. C. 409; § 16, 33 U. S. C. 411 and 33 U. S. C. 412; § 19, 33 U. S. C. 414; § 20, 33 U. S. C. 415 and 42 U. S. C. A. § 1855, *et seq.* With the exception of the last statute, they are printed in the Appendix at pages 36-41, *infra*.

STATEMENT OF THE CASE.

Two cases are involved herein. They were consolidated by the District Court for disposition of the motions to dismiss and/or for summary judgment filed by all of the respondents.

In the case of *United States v. Wyandotte Transportation Co., et al.*, involving the barge Wychem 112, the parties respondent before the District Court and the Court of Appeals were Wyandotte Transportation Co., owner of the Wychem 112; Union Carbide Corporation, owner of the chlorine cargo, and Union Barge Line Corporation, owner and operator of the towboat *Eastern*, which was towing the Wychem 112 at the time of the accident. The facts as alleged in the libel and as adopted by the Court of Appeals were as follows: On March 15-17, 1961, a cargo of 2,200,000 pounds of liquid chlorine was loaded into the tanks of the Wychem 112 at Geismar, Louisiana for delivery to Union Carbide Corporation at South Charleston, West Virginia. On March 21, 1961, the Wychem 112 and other barges in tow of the *Eastern* departed from Geismar with the Wychem 112 positioned in the fourth or last tier of the tow. Above Baton Rouge the tow was rearranged and the Wychem 112 became the lead barge on the port or

lefthand side. On March 23, 1961, with weather and visibility good, but with a strong current, the Wychem 112 began to dive, putting her bow down and her stern up. She sank near Vidalia, Louisiana in the Mississippi River (R. 27). Repeated efforts were made by the owners and operators of the barge during the spring and summer of 1961 to locate and raise the cargo. These efforts were unsuccessful and in November 1961 Wyandotte tendered abandonment of the barge to the Government (R. 53). Thereafter, the Government began a study of the extent and potential danger of the chlorine. In July 1962, technical opinions were issued to the effect that as long as the barge remained in the river, it was a potential danger and recommendations were made to raise the chlorine tanks (R. 202). On September 25, 1962, the District Engineer, Corps of Engineers, Vicksburg District, wrote to Wyandotte, advising that the Secretary of the Army had determined that the sunken barge Wychem 112 was an obstruction to navigation; that Wyandotte's tender of abandonment was accepted and that they were proceeding under authority of the Secretary of the Army to remove the barge under the provisions of Section 19 of the Rivers and Harbors Act of 3 March 1899 (33 U. S. C. A. 414) and that after recovery of the barge Wychem 112 and/or its cargo, the United States would retain the right of possession and title thereto as salvor (R. 54-56). In view of the Government's opinion that the chlorine constituted a hazard to public health and safety, the President on October 10, 1962, proclaimed it a major disaster. The tanks were removed at an alleged cost of approximately \$3,000,000.00. The United States then brought suit *in rem* against the barge and her cargo and *in personam* against Union Carbide Corp., Wyandotte Transportation Co. and Union Barge Line Corp. (R. 203). Upon motion of the United States,

the District Court ordered the sale of the chlorine cargo which had been seized by the Marshal at the commencement of the proceedings and the proceeds paid into Court pending final disposition of the litigation (R. 203).

In the second case, *United States v. Cargill, et al.*, the respondents are the owners, managers, charterers and insurers of the sunken barges L1 and M65. Again, the facts alleged by the Government and adopted by the Court of Appeals were that the M65, owned by Jeffersonville Boat & Machine Co., and the L1, owned by Cargo Carriers Inc., were moored by a tug at the Cargill fleet mooring at Jackson's Landing, Mile 227.5 above Head of Passes, Baton Rouge, Louisiana, on March 30, 1961. The next day the tanker *Esso Zurich*, bound upriver for Baton Rouge, collided with and sank an unmanned and unlighted barge, which was drifting in the channel. The incident was reported by radio to the barge fleet at Baton Rouge and the two barges, M65 and L1, were discovered missing. Although only one barge, believed to be the L1, was located and showed marks of a collision, both barges, L1 and M65, were reported by Cargo Carriers Inc. as sunk. Cargo Carriers Inc. then marked the barges for day and night navigation. On April 9, 20 and 26, 1962, Inland Rivers Transportation Co. and Cargo Carriers Inc. wired the District Engineers that they had abandoned the Barges L1 and M65 and considered the Government the owner of the vessels. The United States refused to accept abandonment and responsibility for marking and removing the wrecks. The United States then brought suit against the owners, managers and charterers of the barges, alleging negligence in the condition and mooring of the barges and praying that the respondents be decreed the owners of the wrecked barges and liable for their removal. The barges remain unmoved (R. 200, 201).

On June 30, 1964, the District Court granted the respondents' motions for summary judgments and dismissed the libels (R. 190). In the Reasons for the judgments of dismissal, the Court ruled that the only right which the Government has to recover the expenses of removal is a right *in rem* against the vessels themselves and that there is no right *in personam* against the owners or operators of the vessels (R. 191).

The Court of Appeals reversed the judgments of dismissal and remanded the cases to the District Court for a determination as to whether the acts of the various respondents in connection with the sinking of the vessels constituted negligence (R. 218, 219). If the respondents in the *Cargill* case are found to be negligent, the District Court is directed to order the respondents to raise the L1 and M65 or bear the reasonable cost of their removal. If negligence is found on the part of the respondents in the *Wychem* case, the damages to which the Government is entitled are those reasonably flowing from respondents' negligence and subsequent failure to raise the vessel.

All of the respondents, with the exception of Union Carbide Corporation, joined in a petition for rehearing *en banc*. In a separate petition, Union Carbide requested that the judgment of the District Court be affirmed. On September 12, 1966, the Court of Appeals granted the petition of Union Carbide and denied the petition of the other respondents (R. 257).

REASONS FOR GRANTING THE WRIT.

I.

In holding that the Government's right to recover expenses of removing a vessel negligently, as opposed to willfully, sunk in a navigable channel includes an *in personam* in addition to an *in rem* right, the Fifth Circuit has created an entirely new remedy. This holding is in direct and irreconcilable conflict with decisions of the Third and Ninth Circuits on the same matter. *The Manhattan*, 85 F. (2d) 427 (CA 3, 1935); *United States v. Zubik*, 295 F. (2d) 53 (CA 3, 1961) and *The Texmar*, 319 F. (2d) 512 (CA 9, 1963, cert. denied 375 U. S. 966). Not only is the Fifth Circuit's opinion in conflict with the Third and Ninth Circuits, but it is also in conflict with its own opinion in *China Union Lines, Ltd. v. A. O. Andersen and Co.* (CA 5, 1966) 364 F. (2d) 769, decided two weeks later than the instant case. Each of these cases holds categorically that the Government has no *in personam* right to recover removal expenses.

The Manhattan, 10 F. Supp. 45, affirmed 85 F. (2d) 437, cert. denied 300 U. S. 654, involved the question of whether the cost of removal of a wreck could be added to the Government's recoverable collision damages. In ruling adversely to the Government, the Court stated (p. 49) that if a sunken vessel is a menace to navigation its disposition is a matter of public concern. That Court not only approved the right of abandonment, but categorically denied the Government's right to recover removal expenses in an *in personam* action. It stated:

"So far as I know the right of recoupment against a tort-feasor who causes a sinking has never been asserted by the government in case the wreck was privately owned, and I can find nothing in the statute which creates such a right either in the case of pri-

vately owned vessels or of those which are the property of the government. In fact, the rights in rem which are conferred would seem to negative that intent. At any rate the statute is silent upon the subject."

The above decision was followed by *Zubik, supra*. Again, the Third Circuit recognized the *in rem* right, and denied the Government's right to recover *in personam*. The issue there was whether the United States was entitled to recover the cost of removing a negligently sunk vessel from a navigable river in an *in personam* action. In reaffirming its previously asserted position, the Court said (p. 57):

"The sum total of the statutory scheme, excepting its criminal penalty provisions, evidences that the forfeiture right accorded to the Government to remove wrecks obstructing navigable waters is in the nature of an *in rem* right against the removed vessel and not an *in personam* right against the vessel owner."

* * *

"It is the province of Congress and not of the Courts to legislate and where Congress has legislated in a particular field explicitly and with definiteness as it has in the Rivers and Harbors Act for the Courts to expand the periphery of the legislative scheme would be judicial trespass." (p. 58.)

The Ninth Circuit in the *Texmar* case (*United States v. Bethlehem Steel Company, et al.*), *supra*, was equally emphatic in declining to commit "judicial trespass" and in confining the Government to its *in rem* rights. It stated (p. 520):

"Looking to the Rivers and Harbors Act for the answer to our problem, as we think we must, we find that Congress, though dealing in detail with the many

problems arising out of wrecks and obstructions to navigation, has not, though it would have been natural and logical for it to have done so if it so desired, created the right which the Government here asserts.

"We conclude, then, that Congress, in the light of the historical law of shipping, which seems to have included a right of an owner to abandon a wreck with impunity, probably did not intend to create, in the Rivers and Harbors Act, the obligation *in personam* which the Government here asserts. If we are correct in this estimate, this court should not read such an obligation into the statutes."

In *China Union Lines, Ltd. v. A. O. Andersen; American Cyanamid Company, et al., supra* (decided July 27, 1966), the Government took charge of a burning vessel which had been damaged by collision, in order to clear the channel. The owner filed limitation of liability proceedings in which the Government filed a claim for removal expenses. The District Court, before issuing the usual injunction, required the owner to pay the expenses of removal into Court in discharge of the Government's lien against the vessel. *The Fifth Circuit explicitly recognized that the Government could not proceed in personam against the vessel owner to recover the expenses of removal. In support of that conclusion, it cited the Texmar and Zubik cases, although, two weeks earlier, in permitting an in personam recovery against the petitioners herein, it had rejected those same decisions. In discussing the in personam liability of the owner, the Fifth Circuit stated (p. 793):*

"On the first issue, the Government must prevail. It had a statutory right to hold the vessel and cargo, dispose thereof at public sale and deduct from the proceeds \$8,582.00, the expenses of removal. While the Government could not proceed in personam,

against China Union, *United States v. Bethlehem Steel Corp.*, 319 F. (2d) 512, (9 Cir. 1963), cert. denied 375 U. S. 966, and *United States v. Zubik*, 295 F. (2d) 53 (3d Cir. 1961), we must remember that it was China Union which was seeking the injunction and a limitation of its liability. It was to its advantage, and the advantage of its underwriters, to free the Reliance of the Government's statutory lien, and secure the decree of injunction. The judge, in requiring China Union to make this payment, recognized that the equities were with the Government and that the Government's lien was first in time and prior in right. *The order of the court did not amount to a judgment in personam against the petitioner, but merely required China Union to do what it should have done in the first instance.*" (Emphasis supplied.)

In this manner the Court enforced the Government's prime *in rem* lien against the wreck.

It is apparent that the Court below is not only in direct conflict with other circuits on the issue of the availability of the *in personam* remedy, but that there is conflict on that issue within the Circuit itself. This conflict between Circuits and within the Fifth Circuit itself can only be resolved by the authoritative action of this Court. The problem presented is one of recurring importance not only to the Government, but also to the maritime industry.

II.

The decision below in further ruling that a vessel sunk in a navigable channel constitutes an "obstruction" within the meaning of § 10 of the Rivers and Harbors Act of 1899, the removal of which may be compelled by injunctive process under § 12 of that Act, is in conflict with the Second Circuit's opinion in *United States v. Wil-*

son (CA 2, 1956), 235 F. (2d) 251. On this issue the opinion below is not only at complete variance with *Wilson*, but occupies the unique position of being the first and only decision so construing §§ 10 and 12 of the statute.

There is involved herein not only a basic conflict between circuits as to the rights accorded the Government, but also a marked difference of view between the Second Circuit and the Court below in the construction and application of the relevant provisions of the Rivers and Harbors Act of 1899. We respectfully urge the necessity of the interposition of this Court to clarify the interpretation of this important federal statute and to resolve this additional conflict.

The Court below, in order to reach the ultimate conclusion that the Government can either compel a negligent party to remove a sunken vessel or pay the cost of removal not only decided that such a vessel is an "obstruction" within the meaning of Section 10 of the Act and that its removal may be compelled by injunctive process under Section 12 but also that the authorization of an *in personam* action is implied from the existing remedies (R. 210). No other decision construing the Rivers and Harbors Act of 1899 so holds.

An interpretation of Sections 10 and 12 was squarely before the Second Circuit in *United States v. Wilson*, *supra*. Section 10 prohibits the creation of any *obstructions* to the navigable waters of the United States and makes it unlawful to *build any structures* in such waters without the approval of the Secretary of the Army. Section 12 provides a fine for violation of Section 10, but provides injunctive relief *only* with respect to *structures* erected in violation of Section 10. The questions as to whether a sunken vessel is an *obstruction* within the purview of Section 10 and whether its removal could be secured by

an injunction under Section 12 was squarely before the Court in *Wilson* and the ruling of the Second Circuit was not only contrary to the ruling of the Court below in the instant case, but was also contrary to the holding of *United States v. Hall*, 63 Fed. 472 (CA 1, 1894), upon which the Court below principally relied. In *Wilson*, the United States brought an action to compel the defendants to remove a sunken barge from the Hudson River. The Government advanced the same legal theory as adopted herein by the Court below. The Second Circuit held, first, that the Rivers and Harbors Act of 1890, under which *Hall* had been decided, was repealed by the 1899 Act—thus destroying *Hall* as a precedent—and, second, that a Section 12 injunction could not be granted to compel the removal of a sunken vessel. The Court ruled that the injunctive power is expressly limited to the “removal of any structures or parts of structures erected in violation of the provision of Sections 9, 10 and 11 of the 1899 Act. 33 U. S. C. A. Sections 401, 403 and 404,” and that a sunken barge, although an “obstruction,” was not a “structure” within the meaning of Sections 9, 10 and 11 of the Act (p. 253). It concluded by saying (p. 253):

“Thus we find nothing in the 1899 Act which justified an injunction whereby the cost of removal may be saddled upon any of these defendants. This conclusion is in accord with *In re Eastern Transportation Co.*, *supra*. On this ground we hold that the dismissal was rightly granted.”

III.

In Article Eighth of its libel involving the Wychem 112, the Government alleges that on October 10, 1962 the "casualty was proclaimed a major disaster" under the provisions of the Disaster Relief Act, Public Law 875, 81st Congress, 42 U. S. C. § 1855, *et seq.* (R. 30). In Article Ninth it alleges that "the tanks were removed with extreme care against any puncture and with a mobilization of the Civil Defense, Public Health and State Authorities under the Disaster Relief Act * * *" (R. 30).

Section 1855 of Title 42 of the United States Code declares the intent of Congress to be "to provide an orderly and continuing means of assistance by the Federal Government to States and local governments in carrying out their responsibilities to alleviate suffering and damage resulting from major disasters, to repair essential public facilities in major disasters, and to foster the development of such State and local organizations and plans to cope with major disasters as may be necessary." There is nothing in the Act itself or in the legislative history of the Act to support any claim that the participating federal agencies may seek reimbursement from private parties who could be said to have created the disaster. Nor is there any basis in the common law for such a remedy. See for example, *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1; *Village of Palmyra v. G. S. Warren, et al.*, 114 Ill. App. 562; *Thornton v. The Livingston Rae* (D. C. N. Y. 1950), 90 F. Supp. 342.

Although the libel plainly indicates that the funds sought to be recovered were not disbursed by the Corps of Engineers under its appropriation for administering the Rivers and Harbors Act of 1899, but were allocated by executive proclamation under the Disaster Relief Act of

1950, the Government has not nor can it show any legal basis or Congressional intent permitting the sovereign to recoup disaster relief costs from the citizenry.

This issue was before both the District Court and the Court of Appeals. It was not reached by either Court in light of their decisions based upon the Rivers and Harbors Act of 1899.

IV.

The issues involved herein have implications which go far beyond the interests of the particular litigants. The Court below was well aware of the overriding public importance of the questions with which it dealt for it said, in referring to the Mississippi River: "The national character of this natural resource gives the Government an essential federal interest in it as a natural artery of commerce," and in referring to the Rivers and Harbors Act of 1899: "our interpretation of the statute is not unusual in view of the wide-spread national interest in its subject matter" (R. 216).

The interest to which the Court referred is not confined to the Government. If the entire maritime industry must assume a new liability, with far-reaching consequences, that liability should be imposed by Congressional rather than judicial action, a position approved and adopted by the Court in the *Texmar* case.

CONCLUSION.

These cases contain fundamental questions involving the interpretation and application of an important federal statute. The decision below is in direct conflict with three decisions in other Circuits and with one decision in the Fifth Circuit. This petition for a writ of certiorari should

be granted so that an authoritative determination of those questions can be made and the conflict resolved.

Respectfully submitted,

LUCIAN Y. RAY,
WILLIAM D. CARLE III of
McCREARY, HINSLEA & RAY,
1550 Union Commerce Building,
Cleveland, Ohio,

BENJAMIN W. YANCEY,
ALFRED M. FARRELL, JR. of
TERRIBERRY, RAULT, CARROLL,
YANCEY & FARRELL,
2141 International Trade
Mart Building,
New Orleans, Louisiana,
*Attorneys for Wyandotte
Transportation
Company.*

GEORGE B. MATTHEWS of
LEMLE & KELLEHER,
1836 National Bank Building,
New Orleans, Louisiana,
*Attorneys for Union Barge
Line Corporation.*

TOM F. PHILLIPS of
TAYLOR, PORTER, BROOKS,
FULLER & PHILLIPS,
Louisiana National Bank
Building,
Baton Rouge 1, Louisiana,

J. BARBEE WINSTON of
PHELPS, DUNBAR, MARKS,
CLAVERIE & SIMS,
Hibernia Building,
New Orleans, Louisiana,
*Attorneys for Cargill,
Inc., et al.*

APPENDIX A.

ORDER AND REASONS OF DISTRICT COURT.

MINUTE ENTRY

JUNE 30, 1964

WEST, J.

(Title Omitted.)

Numbers 667 and 668

These two cases have been consolidated for disposition by this Court on the various motions for summary judgment filed by all respondents in both cases. After pre-trial conference, it was agreed by all parties in both suits that these matters would be submitted to the Court for decision on briefs to be filed, and that disposition of these cases would await the disposition by the United States Supreme Court of a similar matter presented in the case of United States of America v. Bethlehem Steel Corporation, et al., 319 F. 2d 512, which was before that Court on an application for writ of certiorari.

The Bethlehem Steel case having now been disposed of, and after due consideration by this Court of the records in these cases, together with the extensive briefs and exhibits filed by all counsel,

IT IS ORDERED that the motions filed by each respondent in both cases for summary judgment in their favor be, and they are hereby GRANTED, and these suits will be, accordingly, be dismissed at plaintiff's cost.

REASONS

These cases involve the question of whether or not the United States of America may recover damages from the owners and operators of vessels which have been sunk in a navigable stream with or without the negligence of the owners and operators thereof, and subsequently removed from the navigable stream by the United States Government and at its expense.

This Court is unable to find any authority of any kind which would support the proposition that the Government, under these circumstances, has a right to recover the cost of raising such vessels from the owners or operators thereof. The jurisprudence is clear and unequivocal to the effect that the only right in such a case that the United States Government has to recover its expenses is a right in rem against the vessels themselves. There is no right in personam against the owners of the vessels where the owners of the vessels have abandoned them to the Government. In the instant case, the vessels involved were abandoned and the Government did, in fact, acknowledge and accept the abandonment by attaching, seizing, and selling the vessels and their cargoes when raised from the bottom of the Mississippi River. Thus, the Government had the benefit of and has exercised completely its right, in rem, of recovery and it has no further right of recovery against the owners of the vessels. *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 S. Ct. 811 (1888); *Loud v. U. S.*, 286 F. 56 (CA 6 1923); *The Manhattan*, 10 F. Supp. 45, Aff. 85 F. 2d 427 (CA 3 1936); *U. S. v. The Bessemer*, 300 U. S. 654, 57 S. Ct. 432; *Zubik v. U. S.*, 190 F. 2d 278 (CA 3 1951); *U. S. v. Zubik*, 295 F. 2d 53 (CA 3 1961); *U. S. v. Bethlehem Steel Corp., et al.*, 319 F. 2d 512 (CA 9 1963); 33 U. S. C. A. 409, et seq.

/s/ E.G.W.

JUDGMENT OF DISTRICT COURT.

Number 667 and Number 668.

(Title Omitted.)

Filed: June 30, 1964.

For written reasons assigned and filed herein on June 30, 1964:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of all respondents, and against the plaintiff, dismissing these suits at plaintiff's cost.

Baton Rouge, Louisiana, June 30, 1964

/s/ E. GORDON WEST

*United States District Judge***APPENDIX B.****OPINION OF THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

(No. 22148—Title Omitted.)

(July 13, 1966.)

Before RIVES and GEWIN, Circuit Judges, and ALLEGOOD,
District Judge.

GEWIN, Circuit Judge: This is an appeal from the judgment of the United States District Court for the Eastern District of Louisiana in two admiralty cases involving the question of whether one, who by his alleged acts of negligence causes a vessel to sink and obstruct navigation in inland waterways, may abandon the vessel without incurring liability for either its removal or cost of removal. The cases were consolidated¹ by the District Court for dis-

¹ In the case of *United States v. Cargill, et al.*, involving sunken barges L 1 and M 65 the parties defendant are the owners, managers, charterers, and insurers. These barges have not been removed. In the case of *United States v. Wyandotte Trans-*

(Continued on following page)

position of the motions for summary judgment filed by all defendants in both cases pursuant to Rule 58(b) of the Supreme Court Admiralty Rules. The motions for summary judgment were granted and the suits dismissed.

In *United States v. Cargill*, two barges, M 65, owned by Jeffersonville Boat and Machine Corp., and L 1, owned by Cargo Carriers, Inc., were moored by a tug at the Cargill fleet mooring at Jackson's Landing, Mile 227.5 above Head of Passes, Baton Rouge, Louisiana, on March 30, 1961. At approximately 3:32 A.M. on March 31, 1961, the supertanker *Esso Zurich* bound upriver for Baton Rouge collided with and sunk an unmanned and unlighted barge, which was drifting in the channel. The incident was reported by radio to the barge fleet at Baton Rouge and the two barges, M 65 and L 1, were discovered missing. Although only one barge, believed to be the L 1, was located and showed marks of a collision, both barges, L 1 and M 65, were reported by Cargo Carriers, Inc. as sunk. Cargo Carriers, Inc. then marked the barges for day and night navigation. On April 9, 20, and 26, 1962, Inland Rivers Transportation Co. and Cargo Carriers, Inc. wired the District Engineers that they had abandoned the Barges, L 1 and M 65, and considered the Government the owner of the vessels. The United States by return wires refused to accept abandonment and responsibility for marking and removing the wrecks. The United States then brought suit against the owners, managers and charterers of the barges alleging negligence in the condition

(Continued from preceding page)

portation Co., et al., involving the barge Wychem 112 the parties defendant are the owner of the chlorine cargo, Union Carbide Corporation; the owner of the Wychem 112, Wyandotte Transportation Co.; and the owner of the tugboat which was moving the Wychem 112, Union Barge Line Corporation. The chlorine tanks on the Wychem had been removed from the water when the litigation commenced.

and mooring of the barges, to have the defendants decreed the owners of the wrecked barges and liable for their removal.

The facts in the second case, *United States v. Wychem*, are somewhat more dramatic. On March 15-17, 1961, the tanks of the barge, Wychem 112, a liquid chlorine barge, were each filled at Geismar, Louisiana, with 555,000 pounds of chlorine gas to be delivered to Union Carbide Corporation at South Charleston, West Virginia. The barge, owned by Wyandotte Transportation Co., was taken in tow on March 21, 1961, by the towboat Eastern, owned and operated by Union Barge Line Corp. The barge, Wychem 112, was in the fourth and last tier of the four tiers of barges of the tow which kept the chlorine barge under easy observation from the towboat. At Baton Rouge the Wychem 112 was placed in the first tier away from direct observation of the towboat's pilothouse and in a position where it would bear the brunt of the weather. On March 23, 1961, with weather and visibility good but with a strong current the Wychem 112 began to dive and it sank near Vidalia, Louisiana, in the Mississippi River. Effort was made by the owners and operators of the barge in the fall of 1961 to locate and raise the cargo. Two objects were located, either of which could have been the wreck, both under hard packed sand. In November 1961 it was determined that further efforts would be unsuccessful and the owners tendered abandonment to the Government. Thereafter, the Government began a study of the extent and potential danger of the chlorine. In July 1962 technical opinions were issued to the effect that as long as the barge remained in the river it was a potential hazard in that a leak could develop at any time and recommendations were made to raise the chlorine tanks. The Government informed Wyandotte that it accepted abandonment

and would proceed with removal under Section 19 of the Rivers and Harbors Act of 1899.² In view of the Government's opinion that the chlorine constituted a hazard to public health and safety, the President on October 10, 1962, proclaimed it a major disaster. The tanks were removed at a cost of approximately \$3,081,000 with the concerted effort of civil defense, public health and state authorities.³ The United States then brought suit against the cargo, shippers, carriers and consignee, alleging negligence in the construction, condition and towing of the barge to recover the costs of removal. Upon motion of the United States, the District Court ordered the sale of the chlorine cargo and containers which had been seized by the marshal at the commencement of the suit and the proceeds paid into court pending final disposition of the litigation.

The question brought before us in both of these cases is whether one may abandon with impunity an allegedly negligently sunk vessel which obstructs navigation or may the Government compel the negligent party to remove it or pay the cost of removal.

² In the case of the Wychem the record indicates a possible conflict of evidence on the question of whether the Government accepted the abandonment. The trial court concluded that there was an abandonment and that the Government acknowledged and accepted the abandonment by attaching, seizing and selling the vessel, tanks and cargos when raised from the river. As will be seen later a determination of the question of abandonment is not necessary to our decision.

³ For an interesting account of the sinking of the barge, Wychem 112, and the raising of the chlorine containers, see Fales, "Time Bombs in the Mississippi," *Popular Science Monthly*, April 1963.

Of the total sum spent, \$1,565,000 was for engineering expense. The remaining \$1,516,000 was for public health and safety expense, which included precautions against hazards resulting from a possible rupture of the chlorine tanks during their removal.

Appellant contends that under both the Rivers and Harbors Act of 1899, and under the federal common law of abatement of public nuisances, those responsible for the negligent sinking of a vessel in a navigable channel have a duty to remove the vessel or reimburse the United States if it conducts the removal operation.³ It is contended by the appellees that Section 15 of the Rivers and Harbors Act of 1899 gives the owner of a sunken vessel the right to abandon it and that Section 19 of the Act, which gives the Government the right to remove abandoned sunken vessels and proclaims the Government the owner of the vessels and proceeds of their sale, is the sole and exclusive remedy of the United States pertaining to the removal of such vessels from inland waterways.

Congressional action concerning the problem of abandoned craft in the navigable waters of the United States began with the passage of the River and Harbor Act of 1880, 21 Stat. 180 et seq. Section 4, 21 Stat. 197, provided that when a sunken vessel obstructed navigation and was not removed "as soon as practicable," the vessel would be deemed abandoned and subject to removal by the Government. Two years later Congress enlarged the power of the Government granted in the 1880 Act by authorizing the sale of such sunken vessels before their removal.⁴ In 1890 Congress enacted additional legislation⁵ which contained two relevant provisions. Section 8, 26 Stat. 454, provided that if a wrecked vessel remained longer than two months it could be removed by the Government; and Section 10, 26 Stat. 455, prohibited the "creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters," and authorized the issuance of an injunction to compel the re-

³ River and Harbor Act of 1882, 22 Stat. 191, 208-209.

⁵ River and Harbor Act of 1890, 26 Stat. 426 et seq.

removal of such obstructions. Apparently the thrust of these statutes was to explicitly permit the Government to rid channels of abandoned vessels and also to make it clear that obstruction of navigation was unlawful. This is borne out in *United States v. Hall*, 63 F. 472 (1 Cir. 1894), where the Government brought an action to compel the removal of a wilfully abandoned and sunk vessel which obstructed navigation. The court held that vessels were obstructions within the meaning of Section 10 of the 1890 Act and ordered the defendant to remove them. Thus, the court did not interpret those portions of the various acts, which gave the Government the right to remove and sell abandoned vessels, to mean that an abandoned sunken vessel was not an obstruction prohibited by Section 10 of the Act.

Finally, in 1899 Congress enacted the Rivers and Harbors Act⁶ involved in the present litigation. The purpose of this legislation was to codify the existing laws relating to navigable waters and House Conferees stated it made no essential changes in the existing law.⁷ Since the *Hall* case was part of the existing law, it assumes great importance in making a final decision concerning the application of the various sections of the Act.

Those sections of the 1899 Act with which we are concerned are as follows:

Section 10: ⁸"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures * * * except on plans recommended by

⁶ 30 Stat. 1121 et seq., as amended, 33 U.S.C. 401 et seq.

⁷ 32 Cong. Rec., 2296-2298; 32 Cong. Rec. pt. 3, 2923.

⁸ 30 Stat. 1151, 33 U.S.C. 403.

the Chief of Engineer and authorized by the Secretary of the Army; * * *.

Section 12: ⁹ Every person and every corporation that shall violate any of the provisions of sections 9, 10 and 11 * * * shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$2,500 nor less than \$500, or by imprisonment not exceeding one year * * *. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction * * *.

Section 15: ¹⁰ It shall not be lawful to * * * voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; * * *. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it * * * and maintain such marks until the sunken craft is removed or abandoned * * * and it shall be the duty of the owner of such sunken craft to commence the immediate removal * * * and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States * * *.

Section 16: ¹¹ Every person and every corporation that shall violate * * * sections 13, 14 and 15 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$2,500 nor less than \$500, or by imprisonment for not less than 30 days nor more than one year * * *.

Section 19: ¹² Whenever the navigation of any river * * * shall be obstructed or endangered by any

⁹ 30 Stat. 1151, 33 U.S.C. 406.

¹⁰ 30 Stat. 1152, 33 U.S.C. 409.

¹¹ 30 Stat. 1153, 33 U.S.C. 411.

¹² 30 Stat. 1154, 33 U.S.C. 414.

sunken vessel * * * and such obstruction has existed for a longer period than 30 days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel * * * shall be subject to be broken up, removed, sold or otherwise disposed of by the Secretary of the Army at his discretion * * *. That any money received from the sale of such wreck * * * shall be covered into the Treasury of the United States.

It has been argued that the only portions of the Act quoted above which are applicable to sunken vessels are Sections 15, 16 and 19. The obstruction of navigable waters by sunken vessels and the right of the Government to remove these abandoned sunken vessels is given separate and distinct treatment in the Act apart from all other obstructions, thus vessels have been removed from the ambit of Sections 10 and 12. In addition, the earlier Acts which formed the basis of the 1899 Act had no provisions similar to Section 15 of the 1899 Act prohibiting the voluntary and careless sinking of craft in navigable waters, therefore Congress was explicitly treating vessels *in toto* in a section entirely apart from all other prohibitions. The Act further provides a separate criminal penalty for the violation of Section 15 as well as conferring upon the Government all rights of ownership in an abandoned vessel, thus other civil remedies provided by the Act for violation of other sections are inapplicable. Therefore, according to the argument, ignoring Sections 10 and 12 and reading the remaining sections literally, one with impunity can sink and abandon a vessel and incur only the loss of such abandoned vessel plus the possible imposition of the criminal penalties if the sinking occurred voluntarily or carelessly.

Although the statutory language is subject to an interpretation as the foregoing suggests, it is not atune with the

legislative history or logical common sense. The history of the various acts demonstrates an intent of Congress to provide a method of government removal of vessels, not to limit the liability of those causing the sinking. It is illogical to conclude that a vessel is not an obstruction solely because it is given separate treatment. *Hall* bears this out. When that case was decided, provisions for the abandonment and removal of sunken vessels were in existence, but nevertheless the court found that a vessel was still an obstruction. Also, the introduction of the prohibition of Section 15, "unlawful to voluntarily or carelessly sink" seems more likely to be just an emphatic restatement of the Section 10 prohibition against creating an obstruction, and not an effort to remove sunken vessels from the reach of Section 10. In addition, the imposition of a separate criminal penalty along with giving the Government the right to remove and sell the abandoned vessel does not preclude a vessel from being an obstruction.

It has also been argued that even though a vessel is properly an obstruction, the injunction remedy of Section 12 is not applicable to obstructions but just to structures which are separately listed in the various sections. This we think is reading out of a statute what Congress clearly meant to include. There is no reason to limit the injunction to the items which must be built by approval from the Government to the exclusion of obstructions which is the *primary* prohibition of Section 10. The prohibition is directed to "the creation of *any* obstruction" and is not limited to obstructions which are *created* in a peculiar or particular manner.

In addition, the statutes do not specifically authorize a suit by the Government for the recovery of removal expenses. This we think is implied. It is illogical to reason that the Government having been given the right to re-

move is penalized for exercising its right, and in order to gain full benefit from the statutory provisions must wait for the slower injunctive process. The right to recover *in rem* from the vessel so removed flows from ownership of the vessel and does not preclude recovery of reasonable removal costs from a tortfeasor.

Our reading of the statutes now needs to be considered in light of the cases decided under the Act. Unfortunately, they are inconclusive and at best have muddled the waters surrounding the sunken vessels.

Several cases, *Loud v. United States*, 286 F. 56 (6 Cir. 1923); *The Manhattan*, 10 F. Supp. 45 (D. C. Pa. 1935), *aff'd.* 85 F. 2d 427 (3 Cir. 1935), *cert. denied*, sub nom *United States v. The Bessemer*, 300 U. S. 654 (1937); *In re Eastern Transportation Co.*, 102 F. Supp. 913 (D. C. Md.), *aff'd.* sub nom *Ottenheimer v. Whitaker*, 198 F. 2d 289 (4 Cir. 1952); *United States v. Bethlehem Steel Corp. (The Texmar)*, 319 F. 2d 512 (9 Cir. 1963), have concluded that the Sections 10 and 12 are not applicable to sunken vessels. In *Loud* the United States brought an action to recover the amount expended in straightening a sunken vessel in a navigable channel. The sunken barge, owned by Loud, had collided with an abutment and sunk, thus obstructing navigation. The Government after straightening the vessel surrendered it to the owner. The court denied recovery and held that the United States only had a claim against the vessel which it lost by voluntarily surrendering ownership. Significant here is the fact that there were no claims of negligence on the part of Loud, therefore, it may be assumed the collision and sinking were neither the result of wilfulness nor carelessness on the part of Loud. That being true, the case is correctly decided in that Loud has not violated any provision of the Act subjecting him to liability. In the *Manhattan* the Govern-

ment raised its sunken dredge and sought reimbursement from those responsible for its sinking. The court in deciding against the Government considered only the sections of the Act pertaining to the sinking and abandonment of the vessel, and found nothing in the statute allowing the Government to recover from a tortfeasor. The *Ottenheimer* case presented the court with the question of whether the owner of floating barges could abandon them in navigable waters and allow them to sink. The court concluded that despite the forceful opinion of the *Hall* case a vessel was not a structure within the meaning of Sections 10 and 12. Hence it decided the case under Section 15 and concluded that an owner could only abandon a vessel by virtue of "fire, storm, collision or unforeseen unseaworthiness." Since this abandonment was wilful and not one of the above, the court ordered the owners to remove the floating barge. In the *Texmar* case, which is factually similar to the present case, the Government raised an allegedly negligently sunk vessel and sought reimbursement. While admitting the statutes were confusing, the court concluded that sunk vessels were treated outside Section 10; and since Section 15 limited itself to criminal penalties and Section 19 gave the Government the right to recover against the vessel, the Government had no claim. The dissent in the *Texmar* case took the other approach. The removal provisions are not a substitute for Section 10 but the prohibition of Section 10 applies also to vessels.

The line of reasoning in the *Texmar* dissent is demonstrated in several cases; *United States v. Bridgeport Towing Line Inc.*, 15 F. 2d 240 (D. C. Conn. 1926); *United States v. Wilson*, 235 F. 2d 251 (2 Cir. 1956); *United States v. Zubick*, 295 F. 2d 53 (3 Cir. 1961). In *Bridgeport* a craft, while being towed, slipped and sank due to the negligence of the defendants, resulting in an obstruction

to navigable waters. The Government sued for an injunction under Section 12 to compel the owners to remove the craft. The court, while holding that the provisions of Sections 10 and 12 are applicable to the facts presented, denied relief on the ground that the prohibition against the creation of obstructions meant only a prohibition against the wilful, not negligent, creation of navigable obstructions. The *Wilson* case held that a sunken barge was properly an obstruction under Section 10 but the injunction provision of Section 12 only applied to structures and not to obstructions. In *Zubick* the court treated the Section 12 injunctive power and the provisions of Section 19, giving the Government the right to remove sunken vessels, as an election. And since the Government chose to raise the vessel, its rights were limited to the vessel itself or to the proceeds from the sale of such vessel.

Three cases, *United States v. Bethlehem*, 235 F. Supp. 569 (D. C. Md. 1964); *United States v. Perma Paving Co.*, 332 F. 2d 754 (2 Cir. 1964); *United States v. Republic Steel Corp.*, 362 U. S. 482, 80 S. Ct. 884, 4 L. ed. 2d 903 (1960), although not dealing with the problem of sunken vessels, shed light on whether the Section 12 injunction is properly applicable to obstructions. In *Bethlehem* the defendant deliberately grounded a floating drydock in navigable waters. The court held that the drydock was not a vessel, but an obstruction under Section 10, and thereby granted an injunction for its removal. In *Perma* the defendant put excessive weight on his property causing silt to move into the bed of a stream causing obstruction to navigation. The Government sought reimbursement for dredging the channel. The court recognized the application of the injunction power and concluded that there was no basis for reading the statute narrowly; and since the Government could have compelled *Perma* to re-

move the silt, the Government could seek reimbursement for its dredging operations. In *Republic Steel* the Government sought to compel the removal of deposits. The Supreme Court held there to be an obstruction and granted an injunction not by Section 12 but solely under Section 10. The prohibition of an act carried with it the inherent power to enjoin the act.

These cases not only demonstrate an approach far from uniform but illustrate the myriad interpretations of the statutes in question. Faced with this array of diversified opinion we are necessarily thrown back to the legislative history and the wording of the statutes themselves, which leads us to conclude that those cases finding a vessel an obstruction under Section 10 and thus subject to the injunction power of Section 12 are to be given the greatest weight.

Our reading of the statute is identical with an administrative interpretation¹³ adopted by the Army Corps of Engineers which provides in part:

"* * * a person who wilfully or negligently permits a vessel to sink in navigable waters of the United States may not relieve himself from all liability by merely abandoning the wreck. He may be found guilty of a misdemeanor and punished by fine, imprisonment, or both, and in addition may have his license revoked or suspended. He may also be compelled to remove the wreck as a public nuisance or pay for its removal."

This is not "an authorized effort to administratively improve the statute"¹⁴ but a clear and precise statement of what the statute actually says.

¹³ 33 C.F.R. 209.410 (1962), first published at 11 Fed. Reg. 177 A-828 (1946).

¹⁴ The *Texmar* at 520.

Appellees point out that Congress must think it is required to raise vessels from navigable waters for it appropriates funds for "removing sunken vessels or craft obstructing or endangering navigation." 31 U. S. C. 725 a (b) (14). This is certainly no support for the right of an owner to abandon his vessel with impunity because the Government must always bear removal costs of innocent owners; and also the Government might wish to remove a negligently or wilfully sunk vessel instead of enforcing the injunctive process. No doubt there have been cases in the past, and most likely others will arise in the future, when removal by the Government would be the preferred remedy in order to avoid the delays inherent in litigation seeking an injunction. In such a situation the Government would need appropriations for the removal even though it could get reimbursed.

Therefore, we believe the correct reading of the statute allows only an innocent owner to abandon his ship and that a negligent party must raise the vessel or pay for its removal. Although appellees point out that a decision imposing liability on them catches them unprepared for such an occurrence, such an argument seems inappropriate as a means of avoiding the consequences of one's negligence.

A vast inland waterway such as we have under consideration here, the Mississippi River, is a national highway in which all of the people have an interest.¹⁵ It is a national asset. Such streams rarely, if ever, come to us in useful form in their natural state when measured by the standards and requirements of present day commerce.

¹⁵ See, for example, 33 U.S.C. § 10:

"All the navigable rivers and waters in the former territories of Orleans and Louisiana shall be and forever remain public highways."

Precisely for this reason the national Government, and in many cases state and local governments as well, have spent vast sums in successful reasearch and efforts to improve, prepare and maintain them as natural resources. The national character of this natural resource gives the Government an essential federal interest in it as a national artery of commerce.

It is not reasonable, we conclude, for the national Government to go to such trouble and expense to prepare, preserve and maintain this river, allow its use to be impaired seriously by those who use it most, and then permit such users to insulate themselves from liability for proved negligence. Moreover, our interpretation of the statute is not unusual in view of the wide-spread national interest in its subject matter. For example, in dealing with anti-trust legislation involving statutes of remarkable brevity but of wide-spread application, Chief Justice Hughes stated that the Sherman Antitrust Act, "as a charter of freedom, * * * has a generality and adaptability comparable to that found to be desirable in constitutional provisions. * * *

The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness." *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 359-360 (1933). See also *Standard Oil Co. of New Jersey v. United States*, 221 U. S. 1 (1911); Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), p. 5 et seq.

While it is true that the statutes under consideration could have been drafted with greater clarity and more detail, it is clear to us that the Congressional intent underlying the Rivers and Harbors Act to prevent interferences with and obstructions to navigable streams is so compelling and fundamental as to require the inference that appro-

priate civil remedies may be applied to those responsible for such interferences and obstructions. See *United States v. Republic Steel, supra*.

Nor do we consider the reasoning which we have applied to be at variance with fundamental concepts of the law of negligence. In 1897 Mr. Justice Holmes stated:

"I think that the law regards the infliction of temporal damage by a responsible person as actionable, if under the circumstances known to him, the danger of his act is manifest according to common experience, or according to his own experience if it is more than common, except in cases where upon special grounds of policy the law refuses to protect the plaintiff or grants a privilege to the defendant."

"The Path of the Law" (address delivered in 1897); reprinted in "Jurisprudence in Action," p. 276; "A Treasury of Legal Quotations" (Cook 1961), p. 131. In the circumstances of this case the inherent, imminent and impending danger of the presence of 2,220,000 pounds of deadly chlorine gas in the channel of the Mississippi River, and the obstruction resulting from the presence of the sunken barges L 1 and M 65, were certainly and positively clear to these appellees who were engaged in the "more than common experience" of using the river. We are unable to find any special grounds of policy upon which to refuse relief to the Government or to grant a special privilege or exemption to the defendants if it is proved that their negligence caused the sinking of the barges.

Since appellees' liability stems from their allegedly negligent acts regarding the sinking of the various vessels, it must be determined whether the alleged acts constituted negligence on the part of any of the defendants. If the defendants in the *Cargill* case are found to be negligent, the court should order the defendants to raise the barges,

M 65 and L 1, from the navigable waters of the Mississippi River or bear the reasonable cost of their removal. If negligence is found on the part of the defendants in *Wychem*, the damages to which the Government is entitled are those reasonably flowing from appellees' negligence and subsequent failure to raise the vessel. Since the Government properly could have demanded the removal, the cost of removal by the Government is to be given consideration in fixing damages but is not conclusive.

Since we have properly found liability under the Act, it is not necessary to deal with the contentions of the appellant that under the federal common law the appellees are liable for the abatement of a public nuisance.

Judgment reversed and the cases are remanded for a determination of whether the acts of the various defendants constituted negligence.

REVERSED AND REMANDED.

APPENDIX C.**OPINION AND JUDGMENT OF COURT OF APPEALS
ON PETITION FOR REHEARING.**

(No. 22148—Title Omitted.)

Before RIVES and GEWIN, Circuit Judges, and ALLGOOD,
District Judge.

✓ **PER CURIAM:** Upon consideration of the petition for rehearing by Union Carbide Corporation, we conclude that there are no allegations or proof of negligence on the part of Union Carbide Corporation and that the summary judgment of the District Court in its favor ordering dismissal of the libel against it should be and the same hereby is **AFFIRMED**. The opinion, judgment and mandate of this Court are hereby modified and amended in accordance with this order.

It is further **ORDERED** that the petition for rehearing by all of the other parties in said cause be, and the same is hereby **DENIED**.

JUDGMENT.

✓ This cause came on to be heard on the Petitions for Rehearing filed on August 2, 1966;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged that the opinion, judgment and mandate of this Court are hereby modified and amended in accordance with this Court's opinion on rehearing; and that the judgment of the said District Court ordering dismissal of the libel against appellee, Union Carbide Corp., is hereby affirmed.

Issued as Mandate:

September 12, 1966

APPENDIX D.

STATUTES INVOLVED.

33 U. S. C. 403:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. Mar. 3, 1899, c. 425, § 10, 30 Stat. 1151.

33 U. S. C. 406:

Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$2,500 nor less than \$500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court.

And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States. Mar. 3, 1899, c. 425, § 12, 30 Stat. 1151; Feb. 20, 1900, c. 23, § 2, 31 Stat. 32; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167.

33 U. S. C. 409:

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as "sack rafts of timber and logs" in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411-416, 418, and 502 of this title. March 3, 1899, c. 425, § 15, 30 Stat. 1152.

33 U. S. C. 411:

Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$2,500 nor less than \$500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction. Mar. 3, 1899, c. 425, § 16, 30 Stat. 1153.

33 U. S. C. 412:

Any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section 407 of this title to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of the Army, or who shall willfully injure or destroy any work of the United States contemplated in section 408 of this title, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section 409 of this title, shall be deemed guilty of a violation of sections 401, 403, 404, 406, 407, 408, 409, 411-416, 418, 502, 549, 686, and 687 of this title, and shall upon conviction be punished as provided in section 411 of this title, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in vio-

lating any of the provisions of sections 407, 408, and 409 of this title shall be liable for the pecuniary penalties specified in section 411 of this title, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof. Mar. 3, 1889, c. 425, § 16, 30 Stat. 1153.

33 U. S. C. 414:

Whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of the Army at his discretion, without liability for any damage to the owners of the same: *Provided*, That in his discretion, the Secretary of the Army may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed "To whom it may concern," in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof: *And provided also*, That the Secretary of the Army may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be

solicited by public advertisement, giving reasonable notice of not less than ten days, for the removal of such obstruction as soon as possible after the expiration of the above specified thirty days' notice, in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water craft, raft, or other obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the proposition most advantageous to the United States: *Provided*, That such bidder shall give satisfactory security to execute the work: *Provided further*, That any money received from the sale of any such wreck, or from any contractor for the removal of wrecks, under this paragraph shall be covered into the Treasury of the United States. Mar. 3, 1899, c. 425, § 19, 30 Stat. 1154.

33 U. S. C. 415:

Under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in section 414 of this title, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secretary of the Army, or any agent of the United States to whom the Secretary may delegate proper authority, the Secretary of the Army or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused, using his best judgment to prevent an unnecessary injury; and no one shall inter-

fere with or prevent such removal or destruction: *Provided*, That the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it; *And provided further*, That the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States. Mar. 3, 1899, c. 425, § 20, 30 Stat. 1154.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 838

WYANDOTTE TRANSPORTATION CO., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Although we believe that the decision below is correct, we do not oppose the petition. There is a direct conflict between the instant case and *United States v. Zubik*, 295 F. 2d 53 (C.A. 3), and *United States v. Bethlehem Steel Corp.*, 319 F. 2d 512 (C.A. 9), certiorari denied, 375 U.S. 966. Moreover, the issue involved—whether the cost of removing vessels negligently sunk in the navigable waters of the United States must be borne by the tortfeasor rather than

the public Treasury—is an important and recurring one.

1. The decision below involves two separate cases consolidated by the district court. In one (*United States v. 2,220,000 Pounds Chlorine Cargo, etc., et al.*), a barge laden with liquid chlorine under pressure sank in the Mississippi River on March 23, 1961, while being push-towed, and her owner notified the Army Corps of Engineers that it abandoned the barge. In view of the potential menace of over two million pounds of chlorine gas escaping from the barge's tanks, President Kennedy proclaimed the sinking a major disaster and directed that the tanks be removed. The chlorine-laden tanks were then removed from the river bed through the concerted efforts of civil defense, public health, and State authorities at a cost to the government of approximately \$3,081,000. Alleging negligence in the construction, condition, and towing of the chlorine barge, the government brought suit to recover the costs of removal against the cargo, its consignee and the owners of the chlorine barge and the tugboat that was pushing it when the sinking occurred.

In the other case (*United States v. Cargill, Inc., et al.*), the barges L1 and M65 were struck by a supertanker during the early morning hours of March 31, 1961, and sank in the Mississippi River. The owners and charterers of the barges marked them for day and night navigation; they then notified the Corps of Engineers that they abandoned the vessels and deemed the government their owner. The government refused to accept the abandonment. Thereafter,

alleging negligence in the condition and mooring of the barges, the government sued their owners, managers, charterers, and insurers to have them decreed liable for the removal of the barges.

The district court entered summary judgment against the United States in each action on the ground that "the only right * * * that the United States Government has to recover its expenses is a right in rem against the vessels themselves" (Pet. App. 17). The Fifth Circuit reversed and remanded for trial on the issue of petitioners' negligence.¹ The court noted that Section 10 of the Rivers and Harbors Act of 1899 (30 Stat. 1151, 33 U.S.C. 403) prohibits "the creation of any obstruction" to navigation, and that Section 15 (33 U.S.C. 409) specifically makes it unlawful "to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels." Relying, *inter alia*, on *United States v. Republic Steel Corp.*, 362 U.S. 482, the court held that implicit in these statutory prohibitions are the necessary remedies—injunction or money damages—to place on tortfeasors the burden of removing vessels sunk as the result of their negligence. The court rejected petitioners' principal argument that Section 15 of the Act permits the abandonment with impunity of negligently sunk vessels, stating that "the correct reading of the statute allows only

¹ On the petition for rehearing of the consignee of the chlorine cargo, the court of appeals affirmed the summary judgment entered in its favor on the ground that "there are no allegations or proof of negligence" on its part (Pet. App. C).

an innocent owner to abandon his ship and that a negligent party must raise the vessel or pay for its removal" (Pet. App. 31).²

2. The decision below is in direct conflict with decisions of the Third and Ninth Circuits. In *United States v. Zubik*, 295 F. 2d 53 (C.A. 3), the government sued the owner of a negligently sunk vessel to recover the costs expended in raising the wreck. While recognizing in *dictum* (*id.* at 56) that the government may obtain an injunction to compel removal of a sunken vessel, the court of appeals read the Rivers and Harbors Act as limiting the government's right to monetary relief to an *in rem* proceeding against the vessel itself. In *United States v. Bethlehem Steel Corp.*, 319 F. 2d 512 (C.A. 9), the government was denied an injunction to compel the removal of a negligently sunk ship by her owner and charterer. Although acknowledging that Section 15 of the Rivers and Harbors Act prohibits the negligent sinking of a vessel, the court of appeals (Judge Browning dissenting) read this section as conferring on a negligent shipowner the absolute right to limit his liability for removing the vessel to his interest in the vessel.³

² In view of its decision that the Rivers and Harbors Act implicitly afforded the relief requested, the court did not reach the government's alternative argument that it was entitled to the requested relief under the common law and maritime law. In the event that certiorari is granted, the United States reserves the right to renew this argument as an additional basis for affirmance of the judgment below.

³ We do not agree with petitioners' claim (Pet. 7, 10-11) of a conflict between the decision below and the decisions in *China Union Lines, Ltd. v. A. O. Andersen & Co.*, 364 F. 2d

3. Although we do not oppose certiorari, we note briefly our reasons for believing that the decision below is correct. Section 10 of the Act prohibits the creation of "any obstruction" in the navigable waters of the United States, and Section 15 more particularly prohibits the sinking of a vessel. The final clause of Section 15—that " * * * it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same; and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States * * * "—upon which petitioners rely, does not confer on a negligent shipowner the absolute right to limit his liability to his interest in the sunken vessel by abandoning it. Rather, under the traditional principles of admiralty law (see, *e.g.*, the Limitation of Liability

769 (C.A. 5), and *United States v. Wilson*, 235 F. 2d 251 (C.A. 2). In the *China Union* case, the government sought (and was granted) relief solely *in rem* against the vessel; it did not seek recovery *in personam*. The statement in the court's opinion that " * * * the Government could not proceed *in personam* against *China Union* * * * " (*id.* at 792) is dictum. In *Wilson*, the United States sought by injunction to compel the removal of a sunken barge from the Hudson River. The court implicitly held that the barge was an "obstruction" prohibited by Section 10, 33 U.S.C. 403, but also held that injunctive relief was available only under Section 12 of the Act, 33 U.S.C. 406, and that that section's reach was confined to the enjoining of "structures." The latter holding has in effect been overruled by the subsequent decision of this Court in *United States v. Republic Steel Corp.*, 362 U.S. 482, that injunctive relief is not limited to the removal of "structures" and that the right to an injunction against any "obstruction" is implied in the Act.

Act of 1851, 9 Stat. 635, as amended, 46 U.S.C. 182, *et seq.*), only an innocent vessel owner may limit his liability to the vessel; one who intentionally or negligently sinks his vessel may not. Moreover, the final clause of Section 15 may not be read as conferring any rights stemming from an abandonment on tortfeasors other than the vessel owner—such as the charterers of the barges and the tugboat owner in these cases. Accordingly, under this Court's decision in *United States v. Republic Steel Corp.*, *supra*, 362 U.S. 482, an injunction to compel petitioners to remove the sunken barges L1 and M65 would properly issue. And, by analogy, an award of monetary damages is appropriate where the government, because of the exigencies of the matter, has itself removed the obstruction. See *United States v. Perma Paving Co.*, 332 F. 2d 754 (C.A. 2).

4. That the issue is a recurring one is apparent from the cases to which we have already made reference. In addition, we note the pending case of *In the Matter of Marine Leasing Services, Inc.* (E.D. La., Admiralty No. 869) in which the government seeks to recover \$1,757,500 expended in connection with the removal of six hundred tons of liquid chlorine under pressure from another barge, alleged to have been negligently sunk in the Mississippi River in September 1965. The increasing amount of traffic on navigable waters and the increasing size of vessels and their cargoes make it predictable that the issue will continue to arise.

For the foregoing reasons, the United States does not oppose the petition for a writ of certiorari.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

BAREFOOT SANDERS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
MARTIN JACOBS,
Attorneys.

JANUARY 1967.

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED

AUG 23 1967

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1967.

No. 31

**WYANDOTTE TRANSPORTATION COMPANY,
UNION BARGE LINE CORPORATION and
CARGILL, INC., et al.,**

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONERS.

**LUCIAN Y. RAY,
WILLIAM D. CARLE, III of
McCREARY, HINSLEA & RAY,
1550 Union Commerce Building,
Cleveland, Ohio,**

and

**BENJAMIN W. YANCEY,
ALFRED M. FARRELL, JR. of
TERRIBERRY, RAULT, CARROLL,
YANCEY & FARRELL,
2141 International Trade Mart
Building,
New Orleans, Louisiana,
*Attorneys for Wyandotte
Transportation Company.***

**GEORGE B. MATTHEWS of
LEMLE & KELLEHER,
1836 National Bank of Commerce
Building,
New Orleans, Louisiana,
*Attorneys for Union Barge
Line Corporation.***

**TOM F. PHILLIPS of
TAYLOR, PORTER, BROOKS,
FULLER & PHILLIPS,
Louisiana National Bank Building,
Baton Rouge 1, Louisiana,
and**

**J. BARBEE WINSTON,
GERARD T. GELPI of
PHELPS, DUNBAR, MARKS,
CLAVERIE & SIMS,
Hibernia Bank Building,
New Orleans, Louisiana,
*Attorneys for Cargill, Inc., et al.***

SUBJECT INDEX

	PAGE
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTES INVOLVED.....	2
QUESTIONS PRESENTED.....	2
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT.....	6
ARGUMENT.....	8
The decision below is not justified by the history of the Rivers and Harbors Act of 1899 or by prior jurisprudence:.....	8
The decision below is erroneous. It is based upon a misconception of the doctrine of abandonment as applied to negligently sunken vessels, a misinterpretation of the word "obstruction" contained in Section 10 of the Wreck Statute and the unauthorized creation, by implication, of a non-existent remedy:.....	16
A. The Court of Appeals erred in ruling that only an innocent owner can abandon his sunken vessel:.....	17
B. The Court of Appeals erred in ruling that a sunken vessel constitutes an obstruction to navigation under Section 10 of the Rivers and Harbors Act of 1899:.....	22
C. The Court of Appeals erred in ruling that the right of the Government to recover removal expenses is implied:.....	30
There is no provision in the Disaster Relief Act, express or implied, to permit the Government to recover disaster relief expenditures from the citizenry:.....	36

SUBJECT INDEX—(Continued)

	PAGE
CONCLUSION.....	37
APPENDICES:	
A. Order and Reasons of District Court.....	41
Judgment of District Court.....	43
B. Opinion of the United States Court of Appeals for the Fifth Circuit.....	45
C. Opinion and Judgment of Court of Appeals on Petition for Rehearing.....	61
D. Statutes Involved.....	63
E. English and Canadian Statutes.....	75

TABLE OF AUTHORITIES CITED

Cases:

<i>Highlands Navigation Corporation, Petition of</i> , 29 F. 2d 37 (2d Cir. 1928).....	18
<i>Loud v. United States</i> , 286 Fed. 56 (6th Cir. 1923).....	12
<i>Manhattan, The</i> , 3 F. Supp. 75 (E.D. Pa., 1932).....	13, 18
<i>Manhattan, The</i> , (<i>United States v. Atlantic Refin-</i> <i>ing Co.</i>), 10 F. Supp. 45 (E.D. Pa., 1935), <i>aff'd</i> 85 F. 2d 427 (3rd Cir. 1936).....	12, 13, 18
<i>Texmar, The</i> , 319 F. 2d 512 (CA 9, 1963), <i>cert. de-</i> <i>denied</i> 375 U.S. 966.....	13, 14, 16, 18, 29, 31, 32, 33, 34
<i>Thornton v. The Livingston Roe</i> , 90 F. Supp. 342 (S.D. N.Y. 1950).....	37
<i>United States v. The Bessemer</i> , 300 U.S. 654.....	12
<i>United States v. Bethlehem Steel Corporation</i> , 235 F. Supp. 569 (D. Md., 1964).....	27
<i>United States v. Bridgeport Towing Line, Inc.</i> , 15 F. 2d 240 (D. Conn., 1926).....	12
<i>United States v. Hall</i> , 63 Fed. 472 (1st Cir. 1894).....	7, 15, 24, 27, 29, 30

TABLE OF AUTHORITIES CITED—(Continued)

Cases: (Continued)	PAGE
<i>United States v. Moran Towing & Transportation Company</i> , 374 F. 2d 656 (CA 4, 1967)	12, 13, 14, 19, 20, 21, 26, 29, 34, 35
<i>United States v. Perma Paving Co.</i> , 332 F. 2d 754 (CA 2, 1964)	27, 28, 29, 34, 35
<i>United States v. Republic Steel Corp.</i> , 362 U.S. 482	27, 29, 33, 34, 35
<i>United States v. Standard Oil of California</i> , 332 U.S. 301	32
<i>United States v. Wilson</i> , 235 F. 2d 251 (CA 2, 1956)	15, 24
<i>United States v. Zubik</i> , 295 F. 2d 53 (CA 3, 1961)	15, 30, 32, 34
<i>Village of Palmyra v. G. S. Warren et al.</i> , 114 Ill. App. 562 (3rd Dist., 1904)	37
<i>Williamette Iron Bridge Co. v. Hatch</i> , 125 U.S. 1	22, 37
<i>Zubik v. United States</i> , 190 F. 2d 278 (CA 3, 1951)	15
Federal Statutes:	
28 U.S.C. § 1254(1)	1
31 U.S.C. § 725a	11
Disaster Relief Act, Public Law 875, 81st Congress, 42 U.S.C. § 1855, <i>et seq.</i>	2, 36, 37, 68
4 Stat. 32	8
4 Stat. 173	9
5 Stat. 129	9
15 Stat. 174	9
17 Stat. 373	9
21 Stat. 61	9
Rivers and Harbors Appropriation Act of 1880, § 4, 21 Stat. 197	9
22 Stat. 208	9
Rivers and Harbors Appropriation Act of 1888, 25 Stat. 400, 423, 424, 425	22

TABLE OF AUTHORITIES CITED—(Continued)

Federal Statutes: (Continued)

	PAGE
26 Stat. 454, § 8	9, 22
Rivers and Harbors Act of 1890, § 10, 26 Stat. 455	7, 24, 25
Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151, <i>et seq.</i> , as amended	2, 6, 8, 9, 14, 22, 25, 37
Sec. 9 (33 U.S.C. 401)	6, 9, 10, 11
Sec. 10 (33 U.S.C. 402)	10
(33 U.S.C. 403)	2, 6, 7, 8, 9, 10, 11, 15, 22, 23, 24, 26, 27, 28, 29, 30, 31, 34, 63
Sec. 11 (33 U.S.C. 404)	6, 9
Sec. 12 (33 U.S.C. 406)	2, 6, 7, 8, 9, 10, 11, 23, 27, 29, 30, 31, 37, 63
Sec. 15 (33 U.S.C. 409)	2, 7, 10, 18, 23, 26, 35, 64
Sec. 16 (33 U.S.C. 411 and 412)	2, 7, 10, 26, 35, 65
Sec. 19 (33 U.S.C. 414)	2, 4, 7, 10, 23, 26, 35, 66
Sec. 20 (33 U.S.C. 415)	2, 7, 10, 11, 26, 35, 67

English Statutes:

Dublin Port and Docks Act, 32 & 33 Vict. Chap c; Sec. 96	75
Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 Vict. c. 27, s. 56	75
Manchester Ship Canal Act, 1936, sec. 32	76

Canadian Statute:

Revised Statutes of Canada, 1927 Ch. 140, Part II	35, 76
------------------------------------------------------	--------

Miscellaneous:

33 C.F.R. § 209.410	16
Department of the Army pamphlet 27-164, "Mili- tary Reservations and Navigable Waters" (July 1961) pp. 181-182	16

TABLE OF AUTHORITIES CITED—(Continued)

Legislative Materials:

	PAGE
32 Cong. Record 2297 (Senate) and 2923 (House)	22, 23
H. R. 11727, 88th Cong., 2d Sess. (1964)	36
H. R. 11822, 88th Cong., 2d Sess. (1964)	36
H. R. 2100, 89th Cong., 1st Sess. (1965)	36
H. R. 2842, 89th Cong., 1st Sess. (1965)	36
H. R. 17371, 89th Cong., 2d Sess. (1966)	36
H. R. 10593, 90th Cong., 1st Sess. (1967)	36

IN THE
Supreme Court of the United States

OCTOBER TERM, 1967.

No. 31

WYANDOTTE TRANSPORTATION COMPANY,
UNION BARGE LINE CORPORATION and
CARGILL, INC., et al.,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONERS.

CITATION TO OPINIONS BELOW

The opinion of the District Court entered on June 30, 1964, is reported only at 1964 A.M.C. 1742. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 367 F.2d 971. Both opinions, together with the Court of Appeals' opinion and order denying rehearing, are reproduced in Appendices A, B and C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The judgment of the Court of Appeals was entered on July 13, 1966. A petition for rehearing *en banc* was timely

filed, and an order denying the rehearing was entered on September 12, 1966. The petition for a writ of certiorari was filed on December 7, 1966, and was granted on February 13, 1967. (R. 174)

STATUTES INVOLVED

The statutes involved are material parts of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1151 *et seq.*, as amended: 33 U.S.C. § 401 *et seq.*, consisting of § 10, 33 U.S.C. § 403; § 12, 33 U.S.C. § 406; § 15, 33 U.S.C. § 409; § 16, 33 U.S.C. § 411 and 33 U.S.C. § 412; § 19, 33 U.S.C. § 414; § 20; 33 U.S.C. § 415; and 42 U.S.C. § 1855, *et seq.* The statutes are printed in Appendix D.

QUESTIONS PRESENTED

(1) Whether a vessel owner or other party, who by negligence causes a vessel to sink and become an obstruction to navigation, is liable *in personam* to the United States for the costs incurred by the United States in removing the obstruction.

(2) Whether a sunken vessel constitutes an "obstruction" to navigation under § 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403), the removal of which could have been enforced by injunction pursuant to the provisions of § 12 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 406).

(3) Whether the funds expended by the Government to raise WYCHEM 112 under the Disaster Relief Act, 42 U.S.C. § 1885, *et seq.*, are recoverable from the petitioners.

STATEMENT OF THE CASE

Two cases are involved here. They were consolidated by the District Court for disposition of the motions to dis-

miss and/or for summary judgment filed by all of the respondents below, petitioners herein.

In the case of *United States v. Wyandotte Transportation Co., et al.*, involving the Barge WYCHEM 112, the parties respondent before the District Court and the Court of Appeals were Wyandotte Transportation Company, owner of the WYCHEM 112; Union Carbide Corporation, owner of the chlorine cargo; and Union Barge Line Corporation, owner and operator of the M/V EASTERN, which had the WYCHEM 112 in tow at the time of the sinking. The facts as alleged in the libel and as adopted by the Court of Appeals were as follows:

On March 15-17, 1961, a cargo of 2,200,000 pounds of liquid chlorine was loaded into the tanks of the WYCHEM 112 at Geismar, Louisiana, for delivery to Union Carbide Corporation at South Charleston, West Virginia. On March 21, 1961, the WYCHEM 112 and other barges in tow of the EASTERN departed from Geismar, Louisiana, bound up the Mississippi River. On March 23, 1961, with weather and visibility good, but with a strong current, the WYCHEM 112, the lead barge on the port or left-hand side of the tow, began to dive, putting her bow down and her stern up. She sank near Vidalia, Louisiana, in the Mississippi River. Repeated efforts were made by the owners and operators of the barge during the spring and summer of 1961 to locate and raise the barge. These efforts were unsuccessful, and in November, 1961, Wyandotte tendered abandonment of the barge to the Government. (R. 36) On September 25, 1962, the District Engineer, Corps of Engineers, Vicksburg District, wrote to Wyandotte, advising that the Secretary of the Army had determined that the sunken Barge WYCHEM 112 was an obstruction to navigation; that Wyandotte's tender of

abandonment was accepted; that the Engineers were proceeding under the authority of the Secretary of the Army to remove the barge under the provisions of § 19 of the Rivers and Harbors Act of 3 March 1899 (33 U.S.C. § 414); and that after recovery of the Barge WYCHEM 112 and/or its cargo, the United States would retain the right of possession and title thereto. (R. 42) In view of the Government's opinion that the chlorine constituted a hazard to public health and safety, the President on October 10, 1962, proclaimed it a major disaster. The tanks were removed at an alleged cost of \$3,081,000. The United States then brought suit *in rem* against the barge and her cargo and against Wyandotte Transportation Co., Union Carbide Corporation, and Union Barge Line Corporation. On motion of the United States, the District Court ordered the sale of the chlorine cargo, which had been seized by the United States Marshal at the commencement of the proceedings, and the proceeds were paid into Court pending final disposition of the litigation.

In the second case, *United States v. Cargill, Inc., et al*, the respondents are the former owners, managers, charterers, and insurers of the sunken Barges L-1 and M-65. Again, the facts alleged by the Government and adopted by the District Court and the Court of Appeals were that the M-65, owned by Jeffersonville Boat and Machine Co., and the L-1, owned by Cargo Carriers, Inc., were moored by a tug at the Cargill fleet at Jackson's Landing, Mile 227.5 A.H.P., Baton Rouge, Louisiana, on March 30, 1961. The next day the Tanker ESSO ZURICH, bound upriver for Baton Rouge, collided with and sank an unmanned and unlighted barge, which was drifting in the channel. The incident was reported by radio to the barge fleet at Baton Rouge, and the two Barges L-1 and M-65, were discovered missing. Although only one barge, believed to be the L-1,

was located and showed marks of collision, both Barges L-1 and M-65, were reported by Cargo Carriers as sunk. Cargo Carriers then marked the barges for day and night navigation. On April 9, 20 and 26, 1962, Inland Rivers Transportation Co. and Cargo Carriers, Inc. wired the District Engineer that they had abandoned the Barges L-1 and M-65 and considered the Government as owner of the vessels. The United States declined to accept abandonment or the responsibility for marking and removing the wrecks. The United States then filed a declaratory judgment action against the owners, managers, charterers and underwriters of the barges alleging negligence in the condition and mooring of the barges and praying that the Court decree that the responsibility "of marking and removing the wrecks remains with the respondents." The barges remain unremoved.

The respondents in both actions moved to dismiss and/or for summary judgment. On June 30, 1964, the District Court granted the motions for summary judgment and dismissed both actions. (R. 146-147). In its Reasons for Judgment, the District Court held that the only right which the Government had to recover the removal costs was an *in rem* right against the sunken vessels and that there was no *in personam* right against any of the respondents. (R. 146)

The Court of Appeals for the Fifth Circuit reversed the judgments of dismissal and remanded the cases to the District Court for trial and a determination as to whether the sinking of the vessels resulted from the negligence of any of the respondents. (R. 150-165 and 166). The Court held that if the respondents in the WYCHEM case are found to be negligent, the Government is entitled to recover those removal costs reasonably flowing from such

negligence and subsequent failure to raise the barge. If any respondent in the Cargill case is found negligent, the District Court was directed to order such respondent to raise the two sunken barges or bear the reasonable costs of their removal.

All of the respondents with the exception of Union Carbide Corporation joined in a petition for rehearing *en banc*. In a separate petition, Union Carbide requested that the judgment of the District Court be affirmed. On September 12, 1966, the Court of Appeals granted the petition of Union Carbide and denied the petition of the other respondents. (R. 167) The remaining respondents thereafter filed a petition for a writ of certiorari, which was granted by this Court on February 13, 1967. (R. 174)

SUMMARY OF ARGUMENT

Never before, or since, the decision of the Court of Appeals for the Fifth Circuit, in the instant case, has a court held that in the event of a shipwreck, the owner of the sunken vessel or any other party, if found negligent, is personally liable for the cost of removal, or that the removal of the sunken vessel may be compelled by injunctive process. The jurisprudence, which includes decisions of the Courts of Appeal of the Third, Fourth, and Ninth Circuits, is uniform to the effect that a negligent owner or other tortfeasor is not personally responsible for costs of removal of a sunken vessel.

The Rivers and Harbors Act of 1899 (33 U.S.C. 403, *et seq.*) and the history of that Statute do not support the decision of the Court of Appeals. Section 406 (§ 12), which makes provision for injunctive relief, applies only to Sections 401 (§ 9), 403 (§ 10), and 404 (§ 11). These Sections do not by their terms apply to vessels, and at most relate only to structures or obstructions built, erected, or

created by willful, intentional, or deliberate acts. No court other than the Court of Appeals for the Fifth Circuit in the instant case, has held that Section 403 (§ 10) applies to a shipwreck if caused by negligence. A single decision, *United States vs. Hall*, 63 Fed. 472 (1894) of the First Circuit, held that a vessel willfully or intentionally sunk was an obstruction within the meaning of § 10 of the Rivers and Harbors Act of 1890, the Statute preceding the one presently in effect, and its removal could be compelled by injunctive process. That case, even if correctly decided, clearly has no application to the instant case.

The Wreck Statute proper, which applies to shipwrecks, is found in Sections 409 (§ 15), 414 (§ 19), and 415 (§ 20). Penalties are provided for violation of Section 409 (§ 15) by Section 411 (§ 16), which makes it unlawful to sink vessels or other craft in navigable channels, and it is significant that Section 411 (§ 16) does not provide for injunctive process. The remaining Sections of the Wreck Statute, Sections 414 (§ 19) and 415 (§ 20), both give the Secretary of the Army the right to take possession of and to remove a sunken vessel; Section 415 (§ 20) specifically provides that the removal expense "shall be a charge against such craft and cargo," and under both Sections 414 (§ 19) and 415 (§ 20) the vessel and cargo may be sold and the proceeds of the sale covered into the Treasury of the United States. There is not one word in these Sections of the Statute dealing with shipwrecks about injunctive relief, or giving the Government any remedy against any party, in addition to the *in rem* right against the sunken vessel and her cargo.

As the injunctive remedy provided by Section 406 (§ 12) is applicable only to structures or obstructions other than vessels, willfully, deliberately, or purposefully constructed or created, there is no basis for a remedy by in-

plication in favor of the Government in the nature of personal responsibility for the cost of removal on the part of a vessel owner or any other party.

The change in the statute for which the Government argues should be sought through the legislative process, where all interests would have an opportunity to be heard, and where the final decision would be made, after deliberation by the Congress.

ARGUMENT

THE DECISION BELOW IS NOT JUSTIFIED BY THE HISTORY OF THE RIVERS AND HARBORS ACT OF 1899 OR BY PRIOR JURISPRUDENCE.

In holding that a vessel negligently sunk in a navigable channel constitutes an "obstruction" within the meaning of § 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) and that its removal may be compelled by injunctive process pursuant to § 12 of that Statute (33 U.S.C. § 406), or that the owners or other parties responsible for the sinking may be required to bear the costs of removal incurred by the Government, the opinion of the Fifth Circuit stands alone in the jurisprudence. It is the submission of petitioners that in so holding the Court of Appeals misconstrued the provisions of the Rivers and Harbors Act of 1899, and failed to follow the clear and unequivocal jurisprudence established by all of the other circuits which have considered this matter.

Since the early part of the nineteenth century Congress has been aware of the problems involved in creating and maintaining the navigability of the inland waterways, and in 1824 for the first time adopted an act to improve the navigation of the Ohio and Mississippi Rivers, 4 Stat. 32.

Between 1824 and 1880 Congress dealt with the problem of sunken vessels on an individual basis and enacted specific appropriation bills to raise certain wrecks. See, for example, 4 Stat. 173; 5 Stat. 129; 15 Stat. 174; 17 Stat. 373; and 21 Stat. 61. The first federal Wreck Statute, § 4 of the Rivers and Harbors Appropriation Act of 1880, 21 Stat. 197, gave the War Department power to advertise notice in order to establish as a matter of law that a sunken vessel was a derelict and made a permanent appropriation for the removal of wrecks from the navigable waters of the United States. In 1882, this statute was amended to permit the sale of a sunken wreck to the contractor, 22 Stat. 208. In 1890, Congress added a provision that wrecks not raised within two months were subject to being broken up and removed by the War Department without liability for damage to the owners. 26 Stat. 454, § 8.

In 1899, Congress enacted the Rivers and Harbors Act of 1899 (33 U.S.C. § 401, § 403 *et seq.*, 30 Stat. 1151 *et seq.*) This Statute sets forth a considered, comprehensive scheme relating to obstructions to the navigable capacity of waters of the United States and to sunken vessels. Section 401 (§ 9) makes it unlawful to construct any "bridge, dam, dike, or causeway" over or in any navigable water. Section 403 (§ 10) contains two parts. First, it prohibits "the creation of any obstruction * * * to the navigable capacity of any of the waters of the United States," and, second, provides that it shall be unlawful to build "any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures" in the navigable waters. Section 404 (§ 11) authorizes the Secretary of the Army to establish certain harbor lines beyond which no piers, wharves, bulkheads, or other works shall be extended. Section 406 (§ 12) then provides that every person violating the provisions of Sections 401, 403 and 404 (§§ 9, 10 and 11) shall

be deemed guilty of a misdemeanor and subject to fine and imprisonment. This Section then provides that "the removal of any **structures** or parts of structures **erected** in violation of the provisions of said sections" (Section 401 [§ 9], Section 402 and Section 403 [§ 10]) may be enforced by injunctive process. (Emphasis supplied.) No reference is made to removal of the **obstructions** prohibited by Section 403 (§ 10).

The Wreck Statute proper is set forth in 33 U.S.C. §§ 409, 414 and 415 (§§ 15, 19 and 20). Section 409 (§ 15) makes it unlawful to sink, voluntarily or carelessly, or to permit or cause to be sunk, vessels or other craft in navigable channels. It further provides that whenever a vessel or other craft is wrecked in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of said sunken craft immediately to mark it and to maintain the marking until the sunken craft is removed or abandoned. Finally, it is the duty of the owner of the sunken craft to commence the immediate removal of same, and to prosecute it diligently and "failure to do so shall be considered as an abandonment of said craft, and subject the same to removal by the United States as provided for in the act." Section 411 (§ 16) then provides that every person violating the provisions of Section 409 (§ 15) shall be deemed guilty of a misdemeanor and subject to fine and imprisonment.

It is noteworthy that Section 411 (§ 16), the penalty section applicable to Section 409 (§ 15), unlike Section 406 (§ 12), the penalty section applicable to Section 403 (§ 10), does not contain any provision authorizing the removal of sunken craft by injunctive process. On the contrary, Section 414 (§ 19) provides that whenever the navigation of any waterway in the United States "shall be **obstructed**" by any sunken vessel, and such "**obstruction**" has existed

for a period longer than thirty days, or whenever the abandonment of such "**obstruction**" can be legally established within a period less than thirty days, the sunken vessel shall be subject to be broken up, removed, or otherwise disposed of by the Secretary of the Army at his discretion without liability for damage to the owners, and any money received from the sale of any such wreck shall be covered into the Treasury of the United States.

Section 415 (§ 20) gives the Secretary of the Army, "under emergency", the right to take immediate possession of any sunken vessel or craft, and to remove same immediately. This section provides specifically that the removal expense "shall be a charge against such craft and cargo", and if the owners fail or refuse to reimburse the Government for the removal expense, then the craft or cargo may be sold and the proceeds of the sale covered into the Treasury of the United States.

Congress has continued an annual appropriation for "removing sunken vessels or craft obstructing or endangering navigation." 31 U.S.C. § 725a.

The scheme of the Statute is therefore readily apparent. In the case of bridges, etc. (Section 401 [§ 9]) obstructions such as "wharves, piers * * * or other structures" (Section 403 [§ 10]), or excavations or fills (Section 403 [§ 10]), the violator is subject to fine and imprisonment, and the Government is authorized to require their removal by injunctive process, 33 U.S.C. § 406 (§ 12). On the other hand, in the case of obstructions resulting from sunken vessels, either "accidentally or otherwise," the owner is required to remove the sunken vessel or to forfeit his interest therein to the Government, which is then required to effect the removal and is authorized to retain the proceeds of the sale of the sunken craft. There is not one

word in the Statute about recovery of these expenses from any other source, and the Statute does not give the Secretary of the Army any authority to compel the owner of a negligently sunken vessel or any other party to remove it by injunction or otherwise. The only right against the world is the *in rem* right against the sunken vessel and its cargo.

As stated by the Court of Appeals for the Fourth Circuit in *United States v. Moran Towing and Transportation Company*, 374 F. 2d 656 (1967) (at p. 666), "Cargill (the instant case) represents an abrupt departure from the theretofore uniform interpretation of the Wreck Act." This statement is unquestionably true. No court prior to the instant case had held that the Government could recover removal expenses in an *in personam* action. A starting point in the jurisprudence is *Loud v. United States*, 286 Fed. 56 (6th Cir. 1923), which involved an *in personam* action by the Government against the owner of a sunken vessel to recover the amount expended in straightening the vessel so as to clear the channel. The Court of Appeals dismissed the libel saying (p. 59):

"It is equally clear that the owner of a vessel is not personally liable for the expense incurred by the Government in removing obstructions to navigation under the authority of this section (33 U.S.C.A., § 415), but, on the contrary, that the claim for such expenses must be asserted directly against the vessel and its cargo."

To the same effect is *United States v. Bridgeport Towing Line, Inc.*, 15 F. 2d 240 (D. Conn., 1926).

One of the more important cases is *The Manhattan*, 10 F. Supp. 45 (E.D. Pa., 1935), affirmed 85 F. 2d 427 (3rd Cir. 1936), *cert. denied sub. nom. United States v. The Bessemer*, 300 U.S. 654. There, the Tanker BESSEMER,

owned by Atlantic Refining Company, collided with and sank the Government Dredge MANHATTAN. The collision liability was litigated, and the District Court held that the collision and the subsequent sinking of the MANHATTAN were caused solely by the fault of the BESSEMER. 3 F. Supp. 75 (E.D. Pa., 1932). The matter was then referred to a Commissioner for determination of the Government's damages, which included an item covering the cost of raising the dredge, allegedly incurred under the Rivers and Harbors Act. The Commissioner concluded that the removal expense was not recoverable from the negligent BESSEMER since the Government was acting pursuant to a statutory duty, and said (p. 50):

"So far as I know the right of recoupment against a tort-feasor who causes a sinking has never been asserted by the government in case the wreck was privately owned, and I can find nothing in the statute which creates such a right either in the case of privately owned vessels or those which are the property of the government. In fact, the rights in rem which are conferred would seem to negative that intent. At any rate the statute is silent upon the subject."

The Third Circuit affirmed the opinion of the District Court.

The import of *The Manhattan*, of course, is that the Government's claim for reimbursement of removal expenses is limited to the *in rem* claim against the wreck and its cargo, and that it may not obtain reimbursement from a tortfeasor. To the same effect are the decisions of the Ninth Circuit in *The Texmar* (*United States v. Bethlehem Steel Corp.*) 319 F. 2d 512 (1963), *cert. denied*, 375 U.S. 966, and of the Fourth Circuit in *United States v. Moran Towing and Transportation Company*, *supra*.

The *Texmar* involved a claim by the Government against Bethlehem Steel Corporation, as owner of the TEXMAR, and Calmar Steamship Corporation, as charterer and operator, to recover expenses incurred in raising the TEXMAR from a navigable channel where it allegedly constituted an obstruction to navigation. The Government alleged that the vessel had sunk as a result of the negligence of both of the respondents. A motion to dismiss for failure to state a claim was sustained by the District Court and affirmed by the Ninth Circuit, which held that Congress, though dealing in detail in the Rivers and Harbors Act of 1899 with the problems arising out of wrecks and obstructions to navigation, did not, though it could easily have done so, create an *in personam* right to recover removal expenses. In the concurring opinion of Judge Duniway it is said (p. 521) that "(the statute) does not provide for liability on the part of the owner or anyone else if the proceeds of the sale are insufficient to pay the government's costs." This statement is, of course, important because the right to reimbursement was asserted not only against the vessel owner, Bethlehem, but also against its charterer and operator, Calmar.

In *United States v. Moran Towing and Transportation Company, supra*, similar claim was asserted against Bethlehem Steel Corporation, as owner of a floating dry dock, and against Moran Towing and Transportation, whose tugs had the dock in tow when it sank. The District Court held for the Government on the grounds, first, that the floating dry dock was not a vessel, and, second, that if it was, its grounding was intentional. On appeal the Fourth Circuit held that the sinking was not intentional, and went on to hold (p. 669) that even if the sinking was negligent, "Neither Bethlehem nor Moran (the tower), after the tendered abandonment, had any obliga-

tion to remove the obstruction created by the sunken dry dock and no *in personam* liability to reimburse the United States for its costs * * * .”

The two *Zubik* cases in the Third Circuit are to the same effect. *Zubik v. United States*, 190 F. 2d 278 (CA 3, 1951), and *United States v. Zubik*, 295 F. 2d 53 (CA 3, 1961). In the latter *Zubik* case, the Government conceded that a remedy by way of damages was not explicitly accorded by the Statute, but argued that one should be implied. After an exhaustive analysis of the statute, the Court of Appeals said (p. 57):

“The sum total of the statutory scheme, excepting its criminal penalty provision, evidences that the forfeiture right accorded to the Government to remove wrecks obstructing navigable waters is in the nature of an *in rem* right against the removed vessel and not an *in personam* right against the vessel’s owner.”

The only case that may be considered out of line in the jurisprudence is *United States v. Hall*, 63 Fed. 472 (1st Cir. 1894). That case involved an intentional sinking, and the Court issued an injunction under the Rivers and Harbors Act of 1890 to compel the removal of the wreck. For reasons which we will develop later, *Hall* does not bear analysis. The Court of Appeals for the Second Circuit in *United States v. Wilson*, 235 F. 2d 251 (1956), which will also be discussed at length later, refused to follow *Hall*.

We repeat—there is no other case, either before or after the instant one holding that the Government may recover removal expenses from a tortfeasor, and there is no case other than *Hall* holding a sunken vessel to be an obstruction under Section 403 (§ 10).

The weakness of the Government's position in this and in other cases, notably *Texmar*, is indicated by its "bootstrap" reliance on a regulation of the Corps of Engineers. 33 C.F.R. § 209.410. This self-serving regulation provides that a person who negligently sinks a vessel in a navigable waterway may be compelled to remove the wreck or pay for its removal. The Court in *Texmar* disposed of this argument by characterizing the regulation as "an unauthorized effort to administratively improve the statute." (p. 520) However, in another administrative interpretation of the statute, the Department of the Army took a contrary view, saying:

"In removing an abandoned sunken vessel from the navigable waters of the United States, the United States is limited in its recovery to the value of the vessel and its cargo. A claim for further reimbursement against the owners may not be made." Department of the Army pamphlet 27-164, "Military Reservations and Navigable Waters" (July 1961), pp. 181-182.

THE DECISION BELOW IS ERRONEOUS. IT IS BASED UPON A MISCONCEPTION OF THE DOCTRINE OF ABANDONMENT AS APPLIED TO NEGLIGENTLY SUNKEN VESSELS, A MISINTERPRETATION OF THE WORD "OBSTRUCTION" CONTAINED IN SECTION 10 OF THE WRECK STATUTE AND THE UNAUTHORIZED CREATION, BY IMPLICATION, OF A NONEXISTENT REMEDY.

If the decision below were a beacon light, giving for the first time, penetrating and accurate illumination in what the Fifth Circuit has described as "the statutorily muddled waters surrounding sunken vessels," (R. 158) the refusal to follow or be influenced by the decisions of

the other Circuits might conceivably be justified. Solitude or uniqueness does not alone condemn a decision as unsound, but where, as here, that decision is contrary to the uniform rulings of the Courts of Appeal of the Second, Third, Fourth and Ninth Circuits which considered the same questions and the same statutes, its soundness must meet the test of critical analysis. This it does not do.

A.

**THE COURT OF APPEALS ERRED IN RULING
THAT ONLY AN INNOCENT OWNER CAN
ABANDON HIS SUNKEN VESSEL.**

The District Court stated the issue as "whether or not the United States may recover damages from the owners or operators of vessels which have been sunk in a navigable stream with or without the negligence of the owners and operators thereof and subsequently removed from the navigable stream by the United States Government and at its expense." The District Court ruled that the only right which the Government has to recover the cost of raising negligently sunk vessels is a right *in rem* against the vessels themselves and that "there is no right, *in personam*, against the owners of the vessels, where the owners of the vessels have abandoned them to the Government." (R. 147) Faced with this ruling concerning the operative effect of abandonment on the rights and liabilities of the parties, the Court of Appeals in the instant case avoided that issue completely by ruling that only an **innocent** owner can abandon his sunken vessel. This distinction between negligent and innocent sinkings is contrary to the principles of maritime law which antedated the Wreck Statute and is without any support in the applicable provisions of that Statute.

Historically, the owner of a sunken vessel could aban-

don her without responsibility for the expense of removal. The right to abandon was not predicated upon the cause of the sinking. The loss of the craft was no less a loss to the owner because the sinking had resulted from negligence. *The Manhattan, supra*; *The Texmar, supra*.

The above principle was carried over into the Wreck Statute. After providing that "it shall not be lawful to * * * voluntarily or carelessly sink, or permit, or cause to be sunk, vessels or other craft in navigable channels," the Statute goes on to provide that the owner has the duty to mark the wreck and to maintain the marks until the sunken craft is **removed or abandoned**. The section concludes by placing a duty on the owner of immediate removal with the provision that a failure to do so shall be considered an **abandonment** of the craft and subject it to removal by the United States. Rivers and Harbors Act of 1899 § 15 (33 U.S.C. § 409).

It is abundantly clear that, although by statute the negligent sinking of a vessel is unlawful, the duties of both the owner and the Government after the sinking are not related, in any way, to the cause of the sinking. It is also clear that the right, indeed the obligation, of the Government to remove the obstruction is based on the theory that "if the sunken vessel is a menace to navigation its disposition is a matter of public concern". *The Manhattan, supra*; see also, *The Texmar, supra*.

That the Wreck Statute recognized and preserved the right of abandonment given by the general maritime law and the correlative limitation of the Government's right against the world to an *in rem* claim is evident from the following language in *Petition of Highlands Navigation Corporation*, 29 F. (2d) 37, 38 (2 Cir. 1928):

"The Rivers and Harbors Act of March 3, 1899 (U.S. Code, Title 33, [33 U.S.C.A.] §§ 409, 414, 415), recognized the right of abandonment given by the general maritime law, and points out the intention of Congress to preserve that right."

The Court of Appeals for the Fourth Circuit in the case of *United States v. Moran Towing & Transportation Company, supra*, considered this issue of sufficient importance to require the following subheading in its opinion: "Does the Presence of Negligence Defeat the Right of Abandonment?" In answering that question in the negative, the Court said (p. 666) :

"The District Court rejected the contention that when a vessel founders as a result of negligence attributable to the owner, the owner has no right of abandonment under the Wreck Act. Here the United States strongly urges its contention that the owner does not, and it now has the support of a recent decision of the Fifth Circuit in *United States v. Cargill, Inc.*, 5 Cir., 367 F. (2d) 971. We agree with the District Court."

On page 667, the Court continued:

"In contrast, there has been a recognized right of abandonment of a wrecked vessel, unless scuttled intentionally, without any *in personam* liability for the cost of its removal even if it is an obstruction of navigable waters. This was the assumption of the Congress which enacted the Wreck Act. That was the conclusion of the Court in *The Manhattan (United States v. Atlantic Refining Co.)* E.D. Pa., 10 F. Supp. 45, citing *Winpenny and Chedester v. Philadelphia*, 65 Pa. 135. Abandonment had been recognized in § 8 of the Act of September 19, 1890, 26 Stat. 450, which was substantially repeated in 1899 as § 19 of the Wreck Act. The addition of the provisions of § 15 significantly worked no change in the provisions of the 1890 Act."

In an effort to support its conclusion that a vessel owner "may not insulate himself from liability for proved negligence", the Court of Appeals in the instant case refers to the essential federal interest which the Government has in the Mississippi River, as a national highway which must be protected. (R. 162, 163) This, says the Court in *Moran Towing* is offset by a "long history of governmental encouragement and support of water-borne commerce." The effect of placing a premium upon negligence with its consequent denial of statutorily accorded relief is considered in *Moran Towing* (pp. 668-669) :

"*Cargill* adds the rationalization that the nation's waterways exist and, at considerable expense, are maintained by the government for public use, and that no one with substantial impunity, ought to be allowed negligently to create obstructions in them. There has been, however, a long history of governmental encouragement and support of water-borne commerce. The modern ship construction and operating subsidies are extreme examples. It has thus been thought that the theory of the abandonment principle was that the owner who has lost his vessel has suffered all the economic loss which should be visited upon him, and that removal of the wreck, if it constitutes an obstruction to commerce, should be a public obligation. **The risk of such liabilities might be a very substantial deterrent of maritime activity or the acceptance of hazardous cargo.** The owner of the barge laden with chlorine gas with which *Cargill* dealt is an example. The Government's claim exceeds \$3,000,000." (Emphasis supplied.)

This Court knows that Saturn space vehicles are moving by barge from Huntsville, Alabama, to New Orleans, Louisiana, and to the Mississippi Testing Facility and from these points to Cape Kennedy. Petroleum, chemical and other exotic cargoes are being moved daily by barge

and towboat on the Mississippi River and other inland waterways as are fuel, arms, and munitions for the armed forces. The new liability sought to be imposed upon water carriers in the instant case may well require them to limit their operations to the run of the mill, non-hazardous cargo. The language of the Fourth Circuit in *Moran Towing* shows that that Court also recognized that the nature of these cargoes makes it imperative that the rights and remedies of all those interested, including the Government, be at all times clear. (p. 669)

"Moreover, since in almost every foundering there will be some basis for a claim of negligence on the part of the owner or operator, extension of an *in personam* liability for a negligently created obstruction would, result in great uncertainty and extensive litigation before the obligations of the owners and operators can be ascertained. The old rule, the one which logically derives from the statutes, at least has the virtue of clarity and certainty in application." (Emphasis supplied.)

The Court of Appeals in the instant case was not able to point to any language in any section of the Wreck Statute which either expressly or by inference supported its conclusion concerning the right to abandon. It based that conclusion upon what it arbitrarily states is a "correct reading of the statute". (R 162) No other court has so read the statute and no other court has required "innocence" to be a prerequisite. This misreading of the Statute is an error of fundamental importance because only by denying a negligent vessel owner the right to abandon could the Court of Appeals lay the foundation for its holding concerning *in personam* liability. Had the Court of Appeals conceded that right, it would have been required to affirm the District Court.

B.

**THE COURT OF APPEALS ERRED IN RULING
THAT A SUNKEN VESSEL CONSTITUTES AN
OBSTRUCTION TO NAVIGATION UNDER
SECTION 10 OF THE RIVERS AND HARBORS
ACT OF 1899.**

Section 403 (§ 10) was part of a scheme to solve problems **other than sunken vessels** which constituted obstructions. After this Court in *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8, ruled that there was no "common law of the United States" which prohibited obstructions in navigable waters and that it rested with Congress to fill the gap, Congress promptly passed an act controlling the height, span, and placement of bridges, and bridge piers and abutments. Rivers and Harbors Appropriation Act of 1888, 25 Stat. 400, 423, 424, 425. Two years later, Congress made it unlawful to cast off stone, earth, rubbish, wreck, or other waste of any kind which might obstruct navigation. It was made unlawful to build any wharf, dam, breakwater or structure of any kind which might obstruct navigation and prohibited the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters of the United States. Sunken vessels were not considered within the purview of these sections inasmuch as they had been separately dealt with in 1890 when Congress amended prior wreck statutes to provide that wrecks which were not raised within two months were subject to be broken up or removed without liability for any damage to the owners. 26 Stat. 454, Section 8.

The River and Harbors Act of 1899, 30 Stat. 1121, 1151-1155 brought all of the prior statutes together in revised form. The bill was presented to Congress as a codification of existing laws with no essential changes. 32

Cong. Record 2297 (Senate) and 2923 (House). It is significant that Congress did not merge the sections relating to obstructions (structures) not affirmatively authorized by law and the sections relating to sunken vessels, and it is significant that different remedies were provided.

For years the Government has contended, without success (until the decision of the Fifth Circuit in this case), that such a merger exists. It has needed a judicial declaration that the creation "of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States" as set forth in § 10 (Section 403) included sunken vessels, for otherwise the injunctive relief provided in § 12 (Section 406) would not be available, and the Government would be compelled to follow and be bound by the procedural requirements of §§ 15 and 19 (33 U.S.C. § 409 and 33 U.S.C. § 414).

Not only is there no historical justification for expanding the "structures" which are proscribed by § 10 (Section 403) to include "obstructions," regardless of their nature or how they got there, but to do so is violative of a common sense construction of its provisions. The section, on its face, deals with entities which are immovable and permanent and which involve construction; none of these attributes is possessed by sunken vessels. The first phrase of § 10 (Section 403) prohibits obstructions "not affirmatively authorized by Congress." This phrase would be completely redundant if it included sunken vessels because Congress, in other sections, had made it unlawful to "voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels."

The Court of Appeals in the instant case based on its decision primarily on the opinion of the First Circuit in

United States v. Hall, supra. In that case a vessel was intentionally scuttled; and the Government brought an action to compel the defendants to remove the hull on the ground that it constituted an obstruction to navigation. The Court held that § 10 of the Rivers and Harbors Act of 1890 was intended to apply to all obstructions of a permanent character, not authorized by law, and that vessels sunk in harbors by the voluntary act of their owners were obstructions within the meaning of that § 10.

The § 10 of the Rivers and Harbors Act of 1890, under which *Hall* was decided, was substantially different from § 10 (Section 403) of the present Statute. It provided:

"That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited.

* * * Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor * * * [T]he creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court * * * ."

There was, accordingly, express authority for the injunctive process.

An identical contention was made in *United States v. Wilson*, 235 F. 2d 251 (2d Cir. 1956). There the United States brought an action to compel the defendants (successive owners of a sunken barge) to remove a sunken barge from the Hudson River on the authority of *Hall*.

There was some evidence that the barge had been deliberately scuttled, but no finding to that effect. The Court first held that § 10 of the 1890 Statute, which prohibited both the creation and continuance of an obstruction and afforded injunctive relief, was repealed by the 1899 Statute. It then passed to the question of whether or not the Government was entitled to an injunction under the later Act, saying (p. 253):

"Thus the problem is resolved to this: Is the Government entitled to an injunction under the later Act?

"As to this, the only section of the later Act which contains injunctive provisions possibly applicable here is § 12, 33 U.S.C.A. § 406. The injunctive power so provided, is expressly limited to 'the removal of any structures or parts of structures erected in violation of the provisions of' §§ 9, 10 and 11 of the 1899 Act. 33 U.S.C.A. §§ 401, 403 and 404. Clearly, our sunken barge is not a structure prohibited by §§ 9 and 11 which were concerned with bridges, dams, piers, wharves, etc. Nor, we hold, was it a 'structure' as denounced in § 10, 33 U.S.C.A. § 403. In re Eastern Transportation Co., D.C., 102 F. Supp. 913. That section prohibits, first, 'The creation of any [unauthorized] obstruction * * * to the navigable capacity' of United States waters, and, second, the building of 'any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other **structures**' in any port, etc. (Emphasis supplied.) It thus makes a plain distinction between 'obstructions' and 'structures.' Section 12, 33 U.S.C.A. § 406, deliberately we think, restricts its injunctive power to 'structures' and thereby excluded from its injunctive scope the 'obstructions' denounced by § 10, 33 U.S.C.A. § 403. This construction, which we think required by the plain language of the Act and its context, is corroborated by the strong intimations of §§ 15 and 19, 33

U.S.C.A. §§ 409 and 414. Since the injunctive powers conferred by § 12 are limited to the removal of structures violating §§ 9, 10 and 11, clearly they do not extend to violations of §§ 15 and 19. Under § 15 it is the duty of the owner of a sunken craft to commence the immediate removal thereof. But failure to remove is 'considered as an abandonment' thereof which is ground for removal **by the United States** as provided by § 19. And § 19 confers power on the Secretary of War to remove the craft with provision (not to charge the cost of removal to the owner) to forfeit the craft to the contractor employed to accomplish the removal.

"Thus we find nothing in the 1899 Act which justifies an injunction whereby the cost of removal may be saddled upon any of these defendants. This conclusion is in accord with *In re Eastern Transportation Co.*, *supra*. On this ground we hold that the dismissal was rightly granted."

The distinction between "obstructions" under the Wreck Statute (§§ 15, 16, 19 and 20 [33 U.S.C. §§ 409, 411, 412, 414 and 415]) and "structures" under § 10 (33 U.S.C. § 403), which the Court of Appeals below refused to recognize, is clearly set forth in *United States v. Moran Towing and Transportation Company*, *supra*, (p. 662):

"It is readily apparent that the Rivers and Harbors Act of 1899 was concerned with two, largely if not wholly, mutually exclusive classifications. In §§ 401 and 403, there are prohibitions against the construction of bridges, dams, dikes, causeways, walls, piers, dolphins, booms, weirs, breakwaters, bulkheads and jetties without the prior approval of the Chief of Engineers and the Secretary of the Army, if they extend into or over navigable waters. Excavating, filling or altering the course or capacity of any port, canal or channel is similarly prohibited, unless authorized, and the prohibitions of § 403 are introduced by a general prohibition of any

obstruction to the navigable capacity of waters without congressional authorization. These prohibitions are directed, generally, to structures and the product of construction work deliberately erected or created and intruding into or over navigable waters. The primary remedy provided for the removal of any such unauthorized structure is a mandatory injunction requiring its creator to remove the structure or obstructions. The removal, of course, is at the expense of the offender.

"In contrast, §§ 409, 411, 412, 414 and 415, collectively known as the Wreck Act, apply to obstructions in navigable waters created by vessels or other craft anchored, moored or sunk in navigable waters." (Emphasis supplied.)

Although conceding that the cases of *United States v. Bethlehem Steel Corporation*, 235 F. Supp. 569 (D. Md. 1964); *United States v. Perma Paving Co.*, 332 F. (2d) 754 (2 Cir. 1964) and *United States v. Republic Steel Corp.*, 362 U.S. 482 did not deal with sunken vessels, the Court of Appeals here concluded that they afford support for its conclusion that the injunctive remedy accorded by § 12 (Section 406) is applicable to such obstructions. (R. 161)

The decision of the District Court in *Moran Towing (United States v. Bethlehem Steel Corporation)* was reversed on February 10, 1967. The decision of the Court of Appeals for the Fourth Circuit in that case has been discussed herein at some length. On the issue at hand that Court declined to follow *Hall* and ruled that § 10 (Section 403) was not applicable.

Before considering the *Perma Paving* and *Republic Steel* cases it should be pointed out that Clause 3 of § 10 (Section 403) states

" * * * and it shall not be lawful to excavate or fill, or in any manner to alter or modify the

course; location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. Mar. 3, 1899, c 425 § 10, 30 Stat. 1151." (Emphasis supplied.)

Perma Paving involved the removal of silt which had been forced into a channel by reason of the defendant's overloading of its property. The Court ruled that a violation of the abovementioned prohibition against filling channels had occurred, and concluded that inasmuch as the Government could have forced *Perma Paving* to remove the silt, it could recover its reasonable expenses in doing so. In discussing the question of *in personam* liability, reference was made to the cases holding a negligent owner of an abandoned shipwreck immune from personal liability for its removal and the Court said at 332 F. (2d) 758:

" * * * It is enough here that the detailed provisions with respect to wrecked vessels contained in 33 U.S.C. §§ 409, 411, 412, 414 and 415, afford a far stronger basis for immunizing the owners of wrecked vessels from *in personam* liability for the costs of removal than any of the statutes relevant to this case. Indeed, the author of the principal opinion in the *Bethlehem* case [*Texmar*] seemingly assumed that the Government could have recovered the costs of dredging the channel on the facts in *Republic Steel*. 319 F. (2d) 518. (Emphasis supplied.)

After discussing the fundamental differences between actions which involve a deliberate violation of § 10 (Section 403) and the rights which are accorded the owner of a sunken vessel unless the sinking was intentional, the

Court in *Moran Towing* had this to say concerning both *Perma Paving* and *Republic Steel*, (p. 668):

"If there was a recognized immunity from an *in personam* liability for the excess cost of removal of an abandoned wreck when the Congress enacted the Wreck Act in 1899, there can be no logical inference of liability in this area by analogy to *Republic Steel* or *Perma Paving*. All of the relevant cases, far closer to the understanding and assumptions of the times than we, find such an immunity predating or implicit in the Wreck Act. This lends weight to their expositions, and undermines any analogy to be drawn from *Republic Steel* and *Perma Paving*." (footnote omitted.)

The Court of Appeals in *Moran Towing* was of the view that the ruling of this Court in *Republic Steel* did not justify an extension of § 10 (Section 403) to shipwrecks, beyond the *Hall* exception of a deliberate scuttling. 374 F. (2d) at pp. 666, 667.

The Court of Appeals in *Texmar* also found *Republic Steel* to be distinguishable. It pointed out that this Court had treated the silting of the river bottom as the creation of an obstruction within the meaning of 33 U.S.C. § 403 (§ 10) and that if the injunctive relief provided by 33 U.S.C. § 406 (§ 12) was not available, the free navigability of the channel would be seriously impaired and *Republic Steel Corp.*, by repeatedly paying the fine imposed by Section 406 (§ 12), would, in effect, be operating under a license. It found that situation to be clearly distinguishable from an obstruction created by the wreck of a vessel and declined to find a remedy based upon inference. It also declined to accept the implied right to injunctive relief against depositing more industrial waste in a river as creating an implied cause of action to collect indemnity from a vessel owner for the removal of a wreck.

The Court of Appeals for the Third Circuit in the *United States v. Zubik, supra*, also declined to equate an implied right to injunctive relief with an implied cause of action to recover removal expenses. In rejecting that argument, the Court said (p. 58) :

"United States v. Republic Steel Corp., *supra*, has no impact upon the issue in the instant case. The questions there presented and decided are entirely unrelated to the problem here involved."

Thus, alone, among all the circuits which have considered this question, the Court of Appeals for the Fifth Circuit finds a vessel an obstruction under § 10 (Section 403) and therefore subject to the injunctive power of § 12 (Section 406). The only alleged support it has is *Hall* and that decision is distinguishable, both upon its facts and the statute which it construed.

C.

THE COURT OF APPEALS ERRED IN RULING THAT THE RIGHT OF THE GOVERNMENT TO RECOVER REMOVAL EXPENSES IS IMPLIED.

Having held that the Government by injunction may compel removal of a vessel negligently sunk, the Court of Appeals, conceding that the statutes do not specifically authorize a suit by the Government for the recovery of removal expenses, based the existence of such a right upon implication. It reasons that it is illogical to assume that having been given the right to remove a sunken vessel the Government "in order to gain full benefit from the statutory provisions must wait for the slower injunctive process." It writes off the *in rem* remedy, which is expressly provided, by stating that it flows from the ownership of

the vessel and was not intended to "preclude recovery of reasonable removal costs from a tortfeasor." (R. 158)

The ultimate conclusion that the *in personam* remedy exists by implication must necessarily be based upon the foundation that none of the provisions of the Wreck Statute apply; that §§ 10 and 12 (Sections 403 and 406) are alone controlling and that the right to injunctive relief carries with it an alternative remedy. If, as we have demonstrated, a sunken vessel is not a § 10 (Section 403) "obstruction", then the injunctive remedy of § 12 (Section 406) is not available and there remains nothing upon which an implied right or remedy may be based. Congress has declined to create such a right, and the Court of Appeals was without justification in doing so. The Court in *Texmar* declined to read anything into the Statute. It stated (319 F. (2d) at p. 520) :

"Looking to the Rivers and Harbors Act for the answer to our problem, as we think we must, we find that Congress, though dealing in detail with the many problems arising out of wrecks and obstructions to navigation, has not, though it would have been natural and logical for it to have done so if it so desired, created the right which the Government here asserts.

"We conclude, then, the Congress, in the light of the historical law of shipping, which seems to have included a right of an owner to abandon a wreck with impunity, probably did not intend to create, in the Rivers and Harbors Act, the obligation *in personam* which the Government here asserts. If we are correct in this estimate, this court should not read such an obligation into the statutes." (Emphasis supplied.)

On the question of the obligation of the courts to refrain from creating a new liability when Congress has

declined to do so, this Court in *United States v. Standard Oil Company of California, et al*, 332 U.S. 301, 316-317, said this:

" * * * Here the United States is the party plaintiff to the suit. And the United States has power at any time to create the liability. The only question is which organ of the Government is to make the determination that liability exists. That decision, for reasons we have stated, is in this instance for the Congress, not for the Courts. **Until it acts to establish the liability, this Court and others should withhold creative touch.**" (Emphasis supplied.)

Judge Duniway, in his concurring opinion in *Texmar*, also warned against "judicial legislation". He said (319 F. (2d) at p. 522):

"I do not think that the Courts should invent such a result when the Congress has not provided for it. **The matter should be left to the Congress, so that the conflicting interests can be heard and the relative merits of their varying positions can be evaluated, first by appropriate committees and then by the Congress as a whole.**" (Emphasis supplied.)

Similarly, in *Zubik*, the Court said (295 F. (2d) at p. 58):

"The Government's contention that the Rivers and Harbors Act should be given a construction by the courts to accord remedies not therein 'explicitly accorded' because the legislation 'contemplates' the asserted remedies is plainly an effort to achieve judicial legislation. The teaching of the Supreme Court to the contrary since the beginning of our constitutional government is so manifest that citation is not required.

"It is the province of Congress and not that

of the courts to legislate and where Congress has legislated in a particular field explicitly and with definiteness as it has in the Rivers and Harbors Act for the courts to expand the periphery of the legislative scheme would be judicial trespass."

The Court of Appeals in the instant case relies upon *Republic Steel* as support for its conclusion that Congress intended that appropriate civil remedies could be inferred even though, because of lack of clarity, the statutes do not so provide. (R. 163, 164) Before discussing *Republic Steel* in this connection, we quote the words of Judge Duniway in *Texmar* in answer to the assertion that the providing of a civil remedy had escaped the attention of the draftsman. He said (319 F. (2d) at p. 521):

" * * * My reading of this statute leads me to believe that Congress, in enacting them, did put its mind on the question now before us and intended that the liability should be limited to whatever the United States can get for the vessel * * * "

After considering the various provisions of the Wreck Statute dealing with removal of sunken vessels and the expense incurred in connection therewith, Judge Duniway went on to say (p. 522):

" * * * It even expressly dealt with failure or refusal by the owner to reimburse the United States for such expense. The only remedy it provided was a sale of the craft or cargo, the proceeds to be covered into the Treasury. Surely the alternative of a remedy by suit against the owner for the amount of the expense could not have escaped the attention of the draftsmen, but they did not provide for it." (Emphasis supplied.)

It has been heretofore pointed out that *Republic Steel* did not involve sunken vessels nor a consideration of any

NCR



**MICROCARD[®]
EDITIONS, INC.**

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHES
901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037, PHONE (202) 333-6393

CARD 6

of the provisions of the Wreck Statute which deal with such craft. The Courts which decided *Moran Towing, Texmar* and *Zubik* all concluded that *Republic Steel* is distinguishable. None of them accepted that decision as supporting the broad proposition that courts are not required to take a statute as it finds it.

This Court in *Republic Steel* ruled that § 10 (Section 403) "defines the interest of the United States which the injunction serves", 362 U.S. at p. 492. On the same page, the opinion goes on to state that Congress "has provided enough federal law in § 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation." In the case at bar, it is crystal clear that § 10 (Section 403) does not define the "interest of the United States" which is to be here protected, and unless this Court is prepared to disregard all of the provisions of the Wreck Statute and to find that § 10 (Section 403) is alone controlling, it cannot justify even the existence of an injunctive remedy, let alone the right to recover the expenses of removal. The Court, in *Republic Steel*, found it necessary to "fashion a remedy based upon inferences" to avoid the "imputation of Congressional futility". The "futility" does not exist in connection with sunken vessels. When they become obstructions, each procedural step is spelled out in unmistakable language, and a remedy is provided. To base another and completely different remedy upon an inference would do violence to all accepted concepts of legislative construction.

In *Perma Paving* the Court was also dealing with § 10 (Section 403). The Court, itself, recognized that the detailed provisions relating to wrecked vessels set forth in

33 U.S.C. §§ 409, 411, 412, 414 and 415 (§§ 15, 16, 19 and 20) were not involved (332 F. (2d) at p. 758). Its ruling represents an extension of the remedy of injunctive relief to permit the recovery of damages by the Government. The Court in *Moran Towing* was of the view that (374 F. (2d) at p. 667):

“ * * * *Perma Paving* added a reasonable and logical remedy for the rectification of an established wrong; if one can be required by an affirmative injunction to remove the silt he has deposited in a navigable channel, he may be required to reimburse the United States for its reasonable costs in effecting the removal for him”.

The supplementing of an established remedy is far different than the creation, by implication, of a new and different one. There is no sound analogy to the present situation to be drawn from either *Republic Steel* or *Perma Paving*.

The error of the Court of Appeals for the Fifth Circuit's reading into the current Statutes, by implication, the remedy the Government seeks is made more evident by a reading of English Wreck Statutes and the Canadian Wreck Statute, both of which provide for *in personam* liability in connection with the removal of wrecks.¹ Such remedies, where intended by Legislators, are easily and clearly set out and require no implication. The creation or fashioning of new legal remedies, as the Government and the Court of Appeals for the Fifth Circuit in the instant case would undertake, properly and traditionally is a function of the Legislature and not the Courts. This is made startlingly clear by the fact that four members of Congress, obviously recognizing that the applicable stat-

¹ Please see pertinent portions of Canadian and English statutes in Appendix E.

utes do not provide the *in personam* remedy the Government seeks, in recent years have introduced no less than six bills to authorize the United States to recover, from sources other than the wreck itself, the costs incurred in removing wrecks from navigable waters.² All of these bills have been referred to the Committee on Public Works. Congress now is attempting to provide the remedy the Government seeks in this case. This is as it should be, for there all of the many interests involved properly and adequately can have their positions presented. The creation of the new remedy the Government seeks' in the instant case, if it is to be created at all, is not the function of the Judicial system and should be left to the Congress.

**THERE IS NO PROVISION IN THE DISASTER
RELIEF ACT, EXPRESS OR IMPLIED, TO PER-
MIT THE GOVERNMENT TO RECOVER DIS-
ASTER RELIEF EXPENDITURES FROM THE
CITIZENRY.**

In Article VIII of its libel the Government alleges that on October 10, 1962 the "casualty was proclaimed a major disaster" under the provisions of the Disaster Relief Act, Public Law 875, 81st Congress, 42 U.S.C. § 1855, *et seq.* and in Article IX that "the tanks were removed with extreme care against any puncture and with a mobilization of the Civil Defense, Public Health and State Authorities under the Disaster Relief Act * * *."

Section 1855 of Title 42 of the United States Code declares the intent of Congress to be "to provide an orderly and continuing means of assistance by the Federal Gov-

² H.R. 11727; June 24, 1964, Representative Robert McClory. H.R. 11822; June 29, 1964, Representative Robert E. Jones. H.R. 2100; January 7, 1965, Representative Robert E. Jones. H.R. 2842; January 14, 1965, Representative John S. Monagan. H.R. 17371; August 26, 1966, Representative Frank Horton. H.R. 10593; June 6, 1967, Representative John S. Monagan.

ernment to States and local governments in carrying out their responsibilities to alleviate suffering and damage resulting from major disasters, to repair essential public facilities in major disasters, and to foster the development of such state and local organizations and plans to cope with major disasters as may be necessary." There is nothing in the Act itself nor in the legislative history of the Act to support any claim that the participating federal agencies may seek reimbursement from private parties who could be said to have created the disaster. Nor is there any basis in the common law for such a remedy. See, for example, *Willamette Iron Bridge Co. vs. Hatch*, 125 U.S. 1; *Village of Palmyra vs. G. S. Warren et al*, 114 Ill. App. 562 (3rd Dist., 1904); *Thornton vs. The Livingston Roe*, 90 F. Supp. 342 (S.D. N.Y. 1950).

Although the libel plainly indicates that the funds sought to be recovered were not disbursed by the Corps of Engineers under its appropriation for administering the Rivers and Harbors Act of 1899, but were allocated by executive proclamation under the Disaster Relief Act of 1950, the Government has not nor can it show any legal basis or Congressional intent permitting the sovereign to recoup disaster relief costs from the citizenry.

CONCLUSION

The Wreck Statute provides for, and the jurisprudence has consistently recognized, a difference between obstructions or structures erected or created by design, intention, and calculation on the one hand, and sunken vessels or shipwrecks on the other. Clearly, Section 406 (§ 12), providing for injunctive relief, has no application to negligently sunken vessels, and personal liability for the cost of removal on the part of the shipowner or any other party cannot be implied. The decision of the Court of Appeals

for the Fifth Circuit holding to the contrary should be reversed, and the judgment of the District Court in favor of petitioners reinstated.

Respectfully submitted,

LUCIAN Y. RAY,
WILLIAM D. CARLE, III of
McCREARY, HINSLEA & RAY,
1550 Union Commerce Building,
Cleveland, Ohio,

and
BENJAMIN W. YANCEY,
ALFRED M. FARRELL, JR. of
TERRIBERRY, RAULT, CARROLL,
YANCEY & FARRELL,
2141 International Trade Mart
Building,
New Orleans, Louisiana,
*Attorneys for Wyandotte
Transportation Company.*

GEORGE B. MATTHEWS of
LEMLE & KELLEHER,
1836 National Bank of Commerce
Building,
New Orleans, Louisiana,
*Attorneys for Union Barge
Line Corporation.*

TOM F. PHILLIPS of
TAYLOR, PORTER, BROOKS,
FULLER & PHILLIPS,
Louisiana National Bank Building,
Baton Rouge 1, Louisiana,

and
J. BARBEE WINSTON,
GERARD T. GELPI of
PHELPS, DUNBAR, MARKS,
CLAVERIE & SIMS,
Hibernia Bank Building,
New Orleans, Louisiana,
Attorneys for Cargill, Inc., et al.

PROOF OF SERVICE

I, Benjamin W. Yancey, one of the attorneys for petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of , 1967, I served copies of the foregoing Brief on respondent United States of America by mailing a printed, bound copy thereof in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

BENJAMIN W. YANCEY,
Counsel for Wyandotte Transportation
Company,
2141 International Trade Mart
Building,
New Orleans, Louisiana.

APPENDIX A**ORDER AND REASONS OF DISTRICT COURT.****MINUTE ENTRY****JUNE 30, 1964****WEST, J.****(Title Omitted.)****Numbers 667 and 668**

These two cases have been consolidated for disposition by this Court on the various motions for summary judgment filed by all respondents in both cases. After pre-trial conference, it was agreed by all parties in both suits that these matters would be submitted to the Court for decision on briefs to be filed; and that disposition of these cases would await the disposition by the United States Supreme Court of a similar matter presented in the case of United States of America v. Bethlehem Steel Corporation, et al, 319 F. 2d 512, which was before that Court on an application for writ of certiorari.

The Bethlehem Steel case having now been disposed of, and after due consideration by this Court of the records in these cases, together with the extensive briefs and exhibits filed by all counsel.

IT IS ORDERED that the motions filed by each respondent in both cases for summary judgment in their favor be, and they are hereby GRANTED, and these suits will be, accordingly, be dismissed at plaintiff's cost.

REASONS

These cases involve the question of whether or not the United States of America may recover damages from the owners and operators of vessels which have been sunk in

a navigable stream with or without the negligence of the owners and operators thereof, and subsequently removed from the navigable stream by the United States Government and at its expense.

This Court is unable to find any authority of any kind which would support the proposition that the Government, under these circumstances, has a right to recover the cost of raising such vessels from the owners or operators thereof. The jurisprudence is clear and unequivocal to the effect that the only right in such a case that the United States Government has to recover its expenses is a right in rem against the vessels themselves. There is no right in personam against the owners of the vessels where the owners of the vessels have abandoned them to the Government. In the instant case, the vessels involved were abandoned and the Government did, in fact, acknowledge and accept the abandonment by attaching, seizing, and selling the vessels and their cargoes when raised from the bottom of the Mississippi River. Thus, the Government had the benefit of and has exercised completely its right, in rem, of recovery and it has no further right of recovery against the owners of the vessels. *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 S. Ct. 811 (1888); *Loud v. U. S.*, 286 F. 56 (CA 6 1923); *The Manhattan*, 10 F. Supp. 45, Aff. 85 F. 2d 427 (CA 3 1936); *U. S. v. The Bessemer*, 300 U. S. 654, 57 S. Ct. 432; *Zubik v. U. S.*, 190 F. 2d 278 (CA 3 1951); *U. S. v. Zubik*, 295 F. 2d 53 (CA 3 1961); *U. S. v. Bethlehem Steel Corp., et al.*, 319 F. 2d 512 (CA 9 1963); 33 U. S. C. A. 409, et seq.

/s/ E. G. W.

JUDGMENT OF DISTRICT COURT.

Number 667 and Number 668

(Title Omitted.)

Filed: June 30, 1964.

For written reasons assigned and filed herein on June 30, 1964:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of all respondents, and against the plaintiff, dismissing these suits at plaintiff's cost.

Baton Rouge, Louisiana, June 30, 1964

/s/ E. GORDON WEST
United States District Judge

APPENDIX B**OPINION OF THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT.**

(No. 22148—Title Omitted.)

(July 13, 1966.)

Before RIVES and GEWIN, Circuit Judges, and
ALLGOOD, District Judge.

GEWIN, Circuit Judge: This is an appeal from the judgment of the United States District Court for the Eastern District of Louisiana in two admiralty cases involving the question of whether one, who by his alleged acts of negligence causes a vessel to sink and obstruct navigation in inland waterways, may abandon the vessel without incurring liability for either its removal or cost of removal. These cases were consolidated¹ by the District Court for disposition of the motions for summary judgment filed by all defendants in both cases pursuant to Rule 58(b) of the Supreme Court Admiralty Rules. The motions for summary judgment were granted and the suits dismissed.

In *United States v. Cargill*, two barges, M 65, owned by Jeffersonville Boat and Machine Corp., and L 1, owned by Cargo Carriers, Inc., were moored by a tug at the Cargill fleet mooring at Jackson's Landing, Mile 227.5 above Head of Passes, Baton Rouge, Louisiana, on March 30,

¹ In the case of *United States v. Cargill, et al.*, involving sunken barges L 1 and M 65 the parties defendant are the owners, managers, charterers, and insurers. These barges have not been removed. In the case of *United States v. Wyandotte Transportation Co., et al.*, involving the barge Wychem 112 the parties defendant are the owner of the chlorine cargo, Union Carbide Corporation; the owner of the Wychem 112, Wyandotte Transportation Co.; and the owner of the tugboat which was moving the Wychem 112, Union Barge Line Corporation. The chlorine tanks on the Wychem had been removed from the water when the litigation commenced.

1961. At approximately 3:32 A.M. on March 31, 1961, the supertanker *Esso Zurich* bound upriver for Baton Rouge collided with and sunk an unmanned and unlighted barge, which was drifting in the channel. The incident was reported by radio to the barge fleet at Baton Rouge and the two barges, M 65 and L 1, were discovered missing. Although only one barge, believed to be the L 1, was located and showed marks of a collision, both barges, L 1 and M 65, were reported by Cargo Carriers, Inc. as sunk. Cargo Carriers, Inc. then marked the barges for day and night navigation. On April 9, 20, and 26, 1962, Inland Rivers Transportation Co. and Cargo Carriers, Inc. wired the District Engineers that they had abandoned the Barges, L 1 and M 65, and considered the Government the owner of the vessels. The United States by return wires refused to accept abandonment and responsibility for marking and removing the wrecks. The United States then brought suit against the owners, managers and charterers of the barges alleging negligence in the condition and mooring of the barges, to have the defendants decreed the owners of the wrecked barges and liable for their removal.

The facts in the second case, *United States v. Wychem*, are somewhat more dramatic. On March 15-17, 1961, the tanks of the barge, Wychem 112, a liquid chlorine barge, were each filled at Geismar, Louisiana, with 555,000 pounds of chlorine gas to be delivered to Union Carbide Corporation at South Charleston, West Virginia. The barge, owned by Wyandotte Transportation Co., was taken in tow on March 21, 1961, by the towboat Eastern, owned and operated by Union Barge Line Corp. The barge, Wychem 112, was in the fourth and last tier of the four tiers of barges of the tow which kept the chlorine barge under easy observation from the towboat. At Baton Rouge the Wychem 112 was placed in the first tier away from direct

observation of the towboat's pilothouse and in a position where it would bear the brunt of the weather. On March 23, 1961, with weather and visibility good but with a strong current the Wychem 112 began to dive and it sank near Viladia, Louisiana, in the Mississippi River. Effort was made by the owners and operators of the barge in the fall of 1961 to locate and raise the cargo. Two objects were located, either of which could have been the wreck, both under hard packed sand. In November 1961 it was determined that further efforts would be unsuccessful and the owners tendered abandonment to the Government. Thereafter, the Government began a study of the extent and potential danger of the chlorine. In July 1962 technical opinions were issued to the effect that as long as the barge remained in the river it was a potential hazard in that a leak could develop at any time and recommendations were made to raise the chlorine tanks. The Government informed Wyandotte that it accepted abandonment and would proceed with removal under Section 19 of the Rivers and Harbors Act of 1899.² In view of the Government's opinion that the chlorine constituted a hazard to public health and safety, the President on October 10, 1962, proclaimed it a major disaster. The tanks were removed at a cost of approximately \$3,081,000 with the concerted effort of civil defense, public health and state authorities.³ The United States then brought suit against the cargo, ship-

² In the case of the Wychem the record indicates a possible conflict of evidence on the question of whether the Government accepted the abandonment. The trial court concluded that there was an abandonment and that the Government acknowledged and accepted the abandonment by attaching, seizing and selling the vessel, tanks and cargos when raised from the river. As will be seen later a determination of the question of abandonment is not necessary to our decision.

³ For an interesting account of the sinking of the barge, Wychem 112, and the raising of the chlorine containers, see Fales, "Time Bombs in the Mississippi," *Popular Science Monthly*, April 1963.

Of the total sum spent, \$1,565,000 was for engineering expense. The remaining \$1,516,000 was for public health and safety expense, which included precautions against hazards resulting from a possible rupture of the chlorine tanks during their removal.

pers, carriers and consignee, alleging negligence in the construction, condition and towing of the barge to recover the costs of removal. Upon motion of the United States, the District Court ordered the sale of the chlorine cargo and containers which had been seized by the marshal at the commencement of the suit and the proceeds paid into court pending final disposition of the litigation.

The question brought before us in both of these cases is whether one may abandon with impunity an allegedly negligently sunk vessel which obstructs navigation or may the Government compel the negligent party to remove it or pay the cost of removal.

Appellant contends that under both the Rivers and Harbors Act of 1899, and under the federal common law of abatement of public nuisances, those responsible for the negligent sinking of a vessel in a navigable channel have a duty to remove the vessel or reimburse the United States if it conducts the removal operation. It is contended by the appellees that Section 15 of the Rivers and Harbors Act of 1899 gives the owner of a sunken vessel the right to abandon it and that Section 19 of the Act, which gives the Government the right to remove abandoned sunken vessels and proclaims the Government the owner of the vessels and proceeds of their sale, is the sole and exclusive remedy of the United States pertaining to the removal of such vessels from inland waterways.

Congressional action concerning the problem of abandoned craft in the navigable waters of the United States began with the passage of the River and Harbor Act of 1880, 21 Stat. 180 et seq. Section 4, 21 Stat. 197, provided that when a sunken vessel obstructed navigation and was not removed "as soon as practicable," the vessel would be

deemed abandoned and subject to removal by the Government. Two years later Congress enlarged the power of the Government granted in the 1880 Act by authorizing the sale of such sunken vessels before their removal.⁴ In 1890 Congress enacted additional legislation⁵ which contained two relevant provisions. Section 8, 26 Stat. 454, provided that if a wrecked vessel remained longer than two months it could be removed by the Government; and Section 10, 26 Stat. 455, prohibited the "creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters," and authorized the issuance of an injunction to compel the removal of such obstructions. Apparently the thrust of these statutes was to explicitly permit the Government to rid channels of abandoned vessels and also to make it clear that obstruction of navigation was unlawful. This is borne out in *United States v. Hall*, 63 F. 472 (1 Cir. 1894), where the Government brought an action to compel the removal of a wilfully abandoned and sunk vessel which obstructed navigation. The court held that vessels were obstructions within the meaning of Section 10 of the 1890 Act and ordered the defendant to remove them. Thus, the court did not interpret those portions of the various acts, which gave the Government the right to remove and sell abandoned vessels, to mean that an abandoned sunken vessel was not an obstruction prohibited by Section 10 of the Act.

Finally, in 1899 Congress enacted the Rivers and Harbors Act⁶ involved in the present litigation. The purpose of this legislation was to codify the existing laws relating to navigable waters and House Conferees stated it made no essential changes in the existing law.⁷ Since the

⁴ River and Harbor Act of 1882, 22 Stat. 191, 208-209.

⁵ River and Harbor Act of 1890, 26 Stat. 426 et seq.

⁶ 30 Stat. 1121, et seq., as amended, 33 U.S.C. 401 et seq.

⁷ 32 Cong. Rec., 2296-2298; 32 Cong. Rec., pt. 3, 2923.

Hall case was part of the existing law, it assumes great importance in making a final decision concerning the application of the various sections of the Act.

Those sections of the 1899 Act with which we are concerned are as follows:

Section 10:⁸ The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures * * * except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; * * *.

Section 12:⁹ Every person and every corporation that shall violate any of the provisions of sections 9, 10 and 11 * * * shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$2,500 nor less than \$500, or by imprisonment not exceeding one year * * *. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction * * *.

Section 15:¹⁰ It shall not be lawful to * * * voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; * * *. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it * * * and maintain such marks until the sunken craft is removed or abandoned * * * and it shall be the duty of the owner of such sunken craft to commence the immediate removal * * * and failure to

⁸ 30 Stat. 1151, 33 U.S.C. 403.

⁹ 30 Stat. 1151, 33 U.S.C. 406.

¹⁰ 30 Stat. 1152, 33 U.S.C. 409.

do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States * * *.

Section 16:¹¹ Every person and every corporation that shall violate * * * sections 13, 14 and 15 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$2,500 nor less than \$500, or by imprisonment for not less than 30 days nor more than one year * * *.

Section 19:¹² Whenever the navigation of any river * * * shall be obstructed or endangered by any sunken vessel * * * and such obstruction has existed for a longer period than 30 days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel * * * shall be subject to be broken up, removed, sold or otherwise disposed of by the Secretary of the Army at his discretion * * *. That any money received from the sale of such wreck * * * shall be covered into the Treasury of the United States.

It has been argued that the only portions of the Act quoted above which are applicable to sunken vessels are Sections 15, 16 and 19. The obstruction of navigable waters by sunken vessels and the right of the Government to remove these abandoned sunken vessels is given separate and distinct treatment in the Act apart from all other obstructions, thus vessels have been removed from the ambit of Sections 10 and 12. In addition, the earlier Acts which formed the basis of the 1899 Act had no provisions similar to Section 15 of the 1899 Act prohibiting the voluntary and careless sinking of craft in navigable waters, therefore Congress was explicitly treating vessels *in toto* in a section entirely apart from all other prohibitions. The

¹¹ 30 Stat. 1153, 33 U.S.C. 411.

¹² 30 Stat. 1154, 33 U.S.C. 414.

Act further provides a separate criminal penalty for the violation of Section 15 as well as conferring upon the Government all rights of ownership in an abandoned vessel, thus other civil remedies provided by the Act for violation of other sections are inapplicable. Therefore, according to the argument, ignoring Sections 10 and 12 and reading the remaining sections literally, one with impunity can sink and abandon a vessel and incur only the loss of such abandoned vessel plus the possible imposition of the criminal penalties if the sinking occurred voluntarily or carelessly.

Although the statutory language is subject to an interpretation as the foregoing suggests, it is not atune with the legislative history or logical common sense. The history of the various acts demonstrates an intent of Congress to provide a method of government removal of vessels, not to limit the liability of those causing the sinking. It is illogical to conclude that a vessel is not an obstruction solely because it is given separate treatment. *Hall* bears this out. When that case was decided, provisions for the abandonment and removal of sunken vessels were in existence, but nevertheless the court found that a vessel was still an obstruction. Also, the introduction of the prohibition of Section 15, "unlawful to voluntarily or carelessly sink" seems more likely to be just an emphatic restatement of the Section 10 prohibition against creating an obstruction, and not an effort to remove sunken vessels from the reach of Section 10. In addition, the imposition of a separate criminal penalty along with giving the Government the right to remove and sell the abandoned vessel does not preclude a vessel from being an obstruction.

It has also been argued that even though a vessel is properly an obstruction, the injunction remedy of Section 12 is not applicable to obstructions but just to structures

which are separately listed in the various sections. This we think is reading out of a statute what Congress clearly meant to include. There is no reason to limit the injunction to the items which must be built by approval from the Government to the exclusion of obstructions which is the *primary* prohibition of Section 10. The prohibition is directed to "the creation of *any* obstruction" and is not limited to obstructions which are *created* in a peculiar or particular manner.

In addition, the statutes do not specifically authorize a suit by the Government for the recovery of removal expenses. This we think is implied. It is illogical to reason that the Government having been given the right to remove is penalized for exercising its right, and in order to gain full benefit from the statutory provisions must wait for the slower injunctive process. The right to recover *in rem* from the vessel so removed flows from ownership of the vessel and does not preclude recovery of reasonable removal costs from a tortfeasor.

Our reading of the statutes now needs to be considered in light of the cases decided under the Act. Unfortunately, they are inconclusive and at best have muddied the waters surrounding the sunken vessels.

Several cases, *Loud v. United States*, 286 F. 56 (6 Cir. 1923); *The Manhattan*, 10 F. Supp. 45 (D. C. Pa. 1935), *aff'd.* 85 F. 2d 427 (3 Cir. 1935), *cert. denied*, sub nom *United States v. The Bessemer*, 300 U. S. 654 (1937); *In re Eastern Transportation Co.*, 102 F. Supp. 913 (D. C. Md.), *aff'd.* sub nom *Ottenheimer v. Whitaker*, 198 F. 2d 289 (4 Cir. 1952); *United States v. Bethlehem Steel Corp. (The Texmar)*, 319 F. 2d 512 (9 Cir. 1963), have concluded that the Sections 10 and 12 are not applicable to sunken

vessels. In *Loud* the United States brought an action to recover the amount expended in straightening a sunken vessel in a navigable channel. The sunken barge, owned by Loud, had collided with an abutment and sunk, thus obstructing navigation. The Government after straightening the vessel surrendered it to the owner. The court denied recovery and held that the United States only had a claim against the vessel which it lost by voluntarily surrendering ownership. Significant here is the fact that there were no claims of negligence on the part of Loud, therefore, it may be assumed the collision and sinking were neither the result of wilfulness nor carelessness on the part of Loud. That being true, the case is correctly decided in that Loud has not violated any provision of the Act subjecting him to liability. In the *Manhattan* the Government raised its sunken dredge and sought reimbursement from those responsible for its sinking. The court in deciding against the Government considered only the sections of the Act pertaining to the sinking and abandonment of the vessel, and found nothing in the statute allowing the Government to recover from a tortfeasor. The *Ottenheimer* case presented the court with the question of whether the owner of floating barges could abandon them in navigable waters and allow them to sink. The court concluded that despite the forceful opinion of the *Hall* case a vessel was not a structure within the meaning of Sections 10 and 12. Hence it decided the case under Section 15 and concluded that an owner could only abandon a vessel by virtue of "fire, storm, collision or unforeseen unseaworthiness." Since this abandonment was wilful and not one of the above, the court ordered the owners to remove the floating barge. In the *Texmar* case, which is factually similar to the present case, the Government raised an allegedly negligently sunk vessel and sought reimbursement. While admitting the statutes were confusing, the court concluded

that sunk vessels were treated outside Section 10; and since Section 15 limited itself to criminal penalties and Section 19 gave the Government the right to recover against the vessel, the Government had no claim. The dissent in the *Texmar* case took the other approach. The removal provisions are not a substitute for Section 10 but the prohibition of Section 10 applies also to vessels.

The line of reasoning in the *Texmar* dissent is demonstrated in several cases, *United States v. Bridgeport Towing Line Inc.*, 15 F. 2d 240 (D. C. Conn. 1926); *United States v. Wilson*, 235 F. 2d 251 (2 Cir. 1956); *United States v. Zubik*, 295 F. 2d 53 (3 Cir. 1961). In *Bridgeport* a craft, while being towed, slipped and sank due to the negligence of the defendants, resulting in an obstruction to navigable waters. The Government sued for an injunction under Section 12 to compel the owners to remove the craft. The court, while holding that the provisions of Sections 10 and 12 are applicable to the facts presented, denied relief on the ground that the prohibition against the creation of obstructions meant only a prohibition against the wilful, not negligent, creation of navigable obstructions. The *Wilson* case held that a sunken barge was properly an obstruction under Section 10 but the injunction provision of Section 12 only applied to structures and not to obstructions. In *Zubik* the court treated the Section 12 injunctive power and the provisions of Section 19, giving the Government the right to remove sunken vessels, as an election. And since the Government chose to raise the vessel, its rights were limited to the vessel itself or to the proceeds from the sale of such vessel.

Three cases, *United States v. Bethlehem*, 235 F. Supp. 569 (D. C. Md. 1964); *United States v. Perma Paving Co.*, 332 F. 2d 754 (2 Cir. 1964); *United States v. Republic Steel Corp.*, 362 U. S. 482, 80 S. Ct. 884, 4 L. ed. 2d 903

(1960), although not dealing with the problem of sunken vessels, shed light on whether the Section 12 injunction is properly applicable to obstructions. In *Bethlehem* the defendant deliberately grounded a floating drydock in navigable waters. The court held that the drydock was not a vessel, but an obstruction under Section 10, and thereby granted an injunction for its removal. In *Perma* the defendant put excessive weight on his property causing silt to move into the bed of a stream causing obstruction to navigation. The Government sought reimbursement for dredging the channel. The court recognized the application of the injunction power and concluded that there was no basis for reading the statute narrowly; and since the Government could have compelled *Perma* to remove the silt, the Government could seek reimbursement for its dredging operations. In *Republic Steel* the Government sought to compel the removal of deposits. The Supreme Court held there to be an obstruction and granted an injunction not by Section 12 but solely under Section 10. The prohibition of an act carried with it the inherent power to enjoin the act.

These cases not only demonstrate an approach far from uniform but illustrate the myriad interpretations of the statutes in question. Faced with this array of diversified opinion we are necessarily thrown back to the legislative history and the wording of the statutes themselves, which leads us to conclude that those cases finding a vessel an obstruction under Section 10 and thus subject to the injunction power of Section 12 are to be given the greatest weight.

Our reading of the statute is identical with an administrative interpretation¹³ adopted by the Army Corps

¹³ 33 C.F.R. 209.410 (1962), first published at 11 Fed. Reg. 177 A-828 (1946).

of Engineers which provides in part:

" * * * a person who wilfully or negligently permits a vessel to sink in navigable waters of the United States may not relieve himself from all liability by merely abandoning the wreck. He may be found guilty of a misdemeanor and punished by fine, imprisonment, or both, and in addition may have his license revoked or suspended. He may also be compelled to remove the wreck as a public nuisance or pay for its removal."

This is not "an authorized effort to administratively improve the statute"¹⁴ but a clear and precise statement of what the statute actually says.

Appellees point out that Congress must think it is required to raise vessels from navigable waters for it appropriates funds for "removing sunken vessels or craft obstructing or endangering navigation." 31 U. S. C. 725 a (b) (14). This is certainly no support for the right of an owner to abandon his vessel with impunity because the Government must always bear removal costs of innocent owners; and also the Government might wish to remove a negligently or wilfully sunk vessel instead of enforcing the injunctive process. No doubt there have been cases in the past, and most likely others will arise in the future, when removal by the Government would be the preferred remedy in order to avoid the delay inherent in litigation seeking an injunction. In such a situation the Government would need appropriations for the removal even though it could get reimbursed.

Therefore, we believe the correct reading of the statute allows only an innocent owner to abandon his ship and that a negligent party must raise the vessel or pay for its

¹⁴ The *Texmar* at 520.

removal. Although appellees point out that a decision imposing liability on them catches them unprepared for such an occurrence, such an argument seems inappropriate as a means of avoiding the consequences of one's negligence.

A vast inland waterway such as we have under consideration here, the Mississippi River, is a national highway in which all of the people have an interest.¹⁵ It is a national asset. Such streams rarely, if ever, come to us in useful form in their natural state when measured by the standards and requirements of present day commerce. Precisely for this reason the national Government, and in many cases state and local governments as well, have spent vast sums in successful research and efforts to improve, prepare and maintain them as natural resources. The national character of this natural resource gives the Government an essential federal interest in it as a national artery of commerce.

It is not reasonable, we conclude, for the national Government to go to such trouble and expense to prepare, preserve and maintain this river, allow its use to be impaired seriously by those who use it most, and then permit such users to insulate themselves from liability for proved negligence. Moreover, our interpretation of the statute is not unusual in view of the wide-spread national interest in its subject matter. For example, in dealing with anti-trust legislation involving statutes of remarkable brevity but of wide-spread application, Chief Justice Hughes stated that the Sherman Antitrust Act, "as a charter of freedom, * * * has a generality and adaptability comparable to that found to be desirable in constitutional provisions. * * *

¹⁵ See, for example, 33 U.S.C. § 10:

"All the navigable rivers and waters in the former territories of Orleans and Louisiana shall be and forever remain public highways."

The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness." *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 359-360 (1933). See also *Standard Oil Co. of New Jersey v. United States*, 221 U. S. 1 (1911); Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), p. 5 et seq.

While it is true that the statutes under consideration could have been drafted with greater clarity and more detail, it is clear to us that the Congressional intent underlying the Rivers and Harbors Act to prevent interferences with and obstructions to navigable streams is so compelling and fundamental as to require the inference that appropriate civil remedies may be applied to those responsible for such interferences and obstructions. See *United States v. Republic Steel, supra*.

Nor do we consider the reasoning which we have applied to be at variance with fundamental concepts of the law of negligence. In 1897 Mr. Justice Holmes stated:

"I think that the law regards the infliction of temporal damage by a responsible person as actionable, if under the circumstances known to him the danger of his act is manifest according to common experience, or according to his own experience if it is more than common, except in cases where upon special grounds of policy the law refuses to protect the plaintiff or grants a privilege to the defendant."

"The Path of the Law" (address delivered in 1897); reprinted in "Jurisprudence in Action," p. 276; "A Treasury of Legal Quotations" (Cook, 1961), p. 131. In the circumstances of this case the inherent, imminent and impending danger of the presence of 2,220,000 pounds of

deadly chlorine gas in the channel of the Mississippi River, and the obstruction resulting from the presence of the sunken barges L 1 and M 65, were certainly and positively clear to these appellees who were engaged in the "more than common experience" of using the river. We are unable to find any special grounds of policy upon which to refuse relief to the Government or to grant a special privilege or exemption to the defendants if it is proved that their negligence caused the sinking of the barges.

Since appellees' liability stems from their allegedly negligent acts regarding the sinking of the various vessels, it must be determined whether the alleged acts constituted negligence on the part of any of the defendants. If the defendants in the *Cargill* case are found to be negligent, the court ~~should~~ order the defendants to raise the barges, M 65 and L 1, from the navigable waters of the Mississippi River or bear the reasonable cost of their removal. If negligence is found on the part of the defendants in *Wychem*, the damages to which the Government is entitled are those reasonably flowing from appellees' negligence and subsequent failure to raise the vessel. Since the Government properly could have demanded the removal, the cost of removal by the Government is to be given consideration in fixing damages but is not conclusive.

Since we have properly found liability under the Act, it is not necessary to deal with the contentions of the appellant that under the federal common law the appellees are liable for the abatement of a public nuisance.

Judgment reversed and the cases are remanded for a determination of whether the acts of the various defendants constituted negligence.

REVERSED AND REMANDED.

APPENDIX C

**OPINION AND JUDGMENT OF COURT OF
APPEALS ON PETITION FOR REHEARING**

(No. 22148—Title Omitted.)

**Before RIVES and GEWIN, Circuit Judges, and
ALLGOOD, District Judge.**

PER CURIAM: Upon consideration of the petition for rehearing by Union Carbide Corporation, we conclude that there are no allegations or proof of negligence on the part of Union Carbide Corporation and that the summary judgment of the District Court in its favor ordering dismissal of the libel against it should be and the same hereby is **AFFIRMED**. The opinion, judgment and mandate of this Court are hereby modified and amended in accordance with this order.

It is further **ORDERED** that the petition for rehearing by all of the other parties in said cause be, and the same is hereby **DENIED**.

JUDGMENT.

This cause came on to be heard on the Petitions for Rehearing filed on August 2, 1966;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged that the opinion, judgment and mandate of this Court are hereby modified and amended in accordance with this Court's opinion on rehearing; and that the judgment of the said District Court ordering dismissal of the libel against appellee, Union Carbide Corp., is hereby affirmed.

Issued as Mandate:**September 12, 1966**

APPENDIX D**STATUTES INVOLVED.****33 U. S. C. 403:**

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. Mar. 3, 1899, c. 425, § 10, 30 Stat. 1151.

33 U. S. C. 406:

Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$2,500 nor less than \$500, or by imprisonment (in the case of a natural person) not exceeding one year, or by

both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States. Mar. 3, 1899, c. 425, § 12, 30 Stat. 1151; Feb. 20, 1900, c. 23, § 2, 31 Stat. 32; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167.

33 U. S. C. 409:

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as "sack rafts of timber and logs" in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411-416, 418, and 502 of this title. Mar. 3, 1899, c. 425, § 15, 30 Stat. 1152.

33 U. S. C. 411:

Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$2,500 nor less than \$500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction. Mar. 3, 1899, c. 425, § 16, 30 Stat. 1153.

33 U. S. C. 412:

Any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section 407 of this title to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of the Army, or who shall willfully injure or destroy any work of the United States contemplated in section 408 of this title, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section 409 of this title, shall be deemed guilty of a violation of sections 401, 403, 404, 406, 407, 408, 409, 411-416, 418, 502, 549, 686, and 687 of this title, and shall upon conviction be punished as provided in section 411 of this title, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections 407, 408, and 409

of this title shall be liable for the pecuniary penalties specified in section 411 of this title, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof. Mar. 3, 1889, c. 425, § 16, 30 Stat. 1153.

33 U. S. C. 414:

Whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of the Army at his discretion, without liability for any damage to the owners of the same: *Provided*, That in his discretion, the Secretary of the Army may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed "To whom it may concern," in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof: *And provided also*, That the Secretary of the Army may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be solicited by public advertisement, giving reasonable notice of not less than ten days, for the removal of such obstruc-

tion as soon as possible after the expiration of the above specified thirty days' notice, in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water craft, raft, or other obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the proposition most advantageous to the United States: *Provided*, That such bidder shall give satisfactory security to execute the work: *Provided further*, That any money received from the sale of any such wreck, or from any contractor for the removal of wrecks, under this paragraph shall be covered into the Treasury of the United States. Mar. 3, 1899, c. 425, § 19, 30 Stat. 1154.

33 U. S. C. 415:

Under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in section 414 of this title, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secretary of the Army, or any agent of the United States to whom the Secretary may delegate proper authority, the Secretary of the Army or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused, using his best judgment to prevent an unnecessary injury; and no one shall interfere with or prevent such removal or destruction: *Provided*, That the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any

such obstruction requiring them to remove it: *And provided further*, That the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States. Mar. 3, 1899, c. 425, § 20, 30 Stat. 1154.

42 U. S. C. 1855:

It is the intent of Congress to provide an orderly and continuing means of assistance by the Federal Government to States and local governments in carrying out their responsibilities to alleviate suffering and damage resulting from major disasters, to repair essential public facilities in major disasters, and to foster the development of such State and local organizations and plans to cope with major disasters as may be necessary. Sept. 30, 1950, c. 1125, § 1, 64 Stat. 1109.

42 U. S. C. 1855 a:

As used in this chapter, the following terms shall be construed as follows unless a contrary intent appears from the context:

(a) "Major disaster" means any flood, drought, fire, hurricane, earthquake, storm, or other catastrophe in any part of the United States which, in the determination of the President, is or threatens to be of sufficient severity and magnitude to warrant disaster assistance by the Federal Government to supplement the efforts and available resources of States and local governments in alleviating the damage, hardship, or suffering caused thereby, and

respecting which the governor of any State (or the Board of Commissioners of the District of Columbia) in which such catastrophe may occur or threaten certifies the need for disaster assistance under this chapter, and shall give assurance of expenditure of a reasonable amount of the funds of the government of such State, local governments therein, or other agencies, for the same or similar purposes with respect to such catastrophe;

(b). "United States" includes the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands;

(c) "State" means any State in the United States, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands:

(d) "Governor" means the chief executive of any State;

(e). "Local government" means any county, city, village, town, district, or other political subdivision of any State, or the District of Columbia;

(f) "Federal agency" means any department, independent establishment, Government corporation, or other agency of the executive branch of the Federal Government, excepting, however, the American National Red Cross. Sept. 30, 1950, c. 1125, § 2, 64 Stat. 1109; June 27, 1962, Pub.L. 87-502, § 1, 76 Stat. 111.

42 U. S. C. 1855 b:

In any major disaster, Federal agencies are authorized when directed by the President to provide assistance

(a) by utilizing or lending, with or without compensation therefor, to States and local governments their equipment, supplies, facilities, personnel, and other resources, other

than the extension of credit under the authority of any Act; (b) by distributing, through the American National Red Cross or otherwise, medicine, food, and other consumable supplies; (c) by donating or lending equipment and supplies, determined under then existing law to be surplus to the needs and responsibilities of the Federal Government, to States for use or distribution by them for the purposes of this chapter including the restoration of public facilities damaged or destroyed in such major disaster and essential rehabilitation of individuals in need as the result of such major disaster; (d) by performing on public or private lands protective and other work essential for the preservation of life and property, clearing debris and wreckage, making emergency repairs to and temporary replacements of public facilities of States and local governments damaged or destroyed in such major disaster, providing temporary housing or other emergency shelter for families who, as a result of such major disaster, require temporary housing or other emergency shelter, and making contributions to States and local governments for purposes stated in this subdivision. The authority conferred by this chapter, and any funds provided hereunder shall be supplementary to, and not in substitution for, nor in limitation of, any other authority conferred or funds provided under any other law. Any funds received by Federal agencies as reimbursement for services or supplies furnished under the authority of this section shall be deposited to the credit of the appropriation or appropriations currently available for such services or supplies. The Federal Government shall not be liable for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government in carrying out the provisions of this section. Sept. 30, 1950, c. 1125, § 3, 64 Stat. 1110; Aug. 3, 1951, c. 293, § 2, 65 Stat.

173; July 17, 1953, c. 225, 67 Stat. 180; June 27, 1962, Pub.L. 87-502, § 2, 76 Stat. 111.

42 U. S. C. 1855 c:

In providing such assistance hereunder, Federal agencies shall cooperate to the fullest extent possible with each other and with States and local governments, relief agencies, and the American National Red Cross, but nothing contained in this chapter shall be construed to limit or in any way affect the responsibilities of the American National Red Cross under chapter 1 of Title 36. Sept. 30, 1950, c. 1125, § 4, 64 Stat. 1110.

42 U. S. C. 1855 d:

(a) In the interest of providing maximum mobilization of Federal assistance under this chapter, the President is authorized to coordinate in such manner as he may determine the activities of Federal agencies in providing disaster assistance. The President may direct any Federal agency to utilize its available personnel, equipment, supplies, facilities, and other resources, in accordance with the authority herein contained.

(b) The President may, from time to time, prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this chapter, and he may exercise any power or authority conferred on him by any section of this chapter either directly or through such Federal agency as he may designate. Sept. 30, 1950, c. 1125, § 5, 64 Stat. 1110.

42 U. S. C. 1855 e:

If facilities owned by the United States are damaged or destroyed in any major disaster and the Federal agency having jurisdiction thereof lacks the authority or an ap-

appropriation to repair, reconstruct, or restore such facilities, such Federal agency is authorized to repair, reconstruct, or restore such facilities to the extent necessary to place them in a reasonably usable condition and to use therefor any available funds not otherwise immediately required: *Provided, however,* That the President shall first determine that the repair, reconstruction, or restoration is of such importance and urgency that it cannot reasonably be deferred pending the enactment of specific authorizing legislation or the making of an appropriation therefor. If sufficient funds are not available to such Federal agency for use in repairing, reconstructing, or restoring such facilities as above provided, the President is authorized to transfer to such Federal agency funds made available under this chapter in such amount as he may determine to be warranted in the circumstances. If said funds are insufficient for this purpose, there is authorized to be appropriated to any Federal agency repairing, reconstructing, or restoring facilities under authority of this section such sum or sums as may be necessary to reimburse appropriated funds to the amount expended therefrom. Sept. 30, 1950, c. 1125, § 6, 64 Stat. 1111.

42 U. S. C. 1855 f:

In carrying out the purposes of this chapter, any Federal agency is authorized to accept and utilize with the consent of any State or local government, the services and facilities of such State or local government, or of any agencies, officers, or employees thereof. Any Federal agency, in performing any activities under section 1855b of this title, is authorized to employ temporarily additional personnel without regard to the civil-service laws and the Classification Act of 1949, as amended, and to incur obligations on behalf of the United States by contract or otherwise for the acquisition, rental, or hire of equipment, serv-

ices, materials, and supplies for shipping, drayage, travel and communication, and for the supervision and administration of such activities. Such obligations, including obligations arising out of the temporary employment of additional personnel, may be incurred by any agency in such amount as may be made available to it by the President out of the funds specified in section 1855g of this title. The President may, also, out of such funds, reimburse any Federal agency for any of its expenditures under section 1855b of this title in connection with a major disaster, such reimbursement to be in such amounts as the President may deem appropriate. Oct. 28, 1949, c. 782, Title XI, § 1106(a), 63 Stat. 972; Sept. 30, 1950, c. 1125, § 7, 64 Stat. 1111.

42 U. S. C. 1855 g:

There is authorized to be appropriated to the President a sum or sums, not exceeding \$5,000,000 in the aggregate, to carry out the purposes of this chapter. The President shall transmit to the Congress at the beginning of each regular session a full report covering the expenditure of the amounts so appropriated with the amounts of the allocations to each State under this chapter. The President may from time to time transmit to the Congress supplemental reports in his discretion, all of which reports shall be referred to the Committees on Appropriations and the Committees on Public Works of the Senate and the House of Representatives. Sept. 30, 1950, c. 1125, § 8, 64 Stat. 1111.



APPENDIX E

COMPARATIVE WRECK STATUTES

English Statutes

British harbors, rivers, and canals are put in the care of local commissioners, undertakers, companies, and the like, each by separate local act. Examples of a few of these acts, concerning wreck removal, are as follows

Dublin Port and Docks Act, 32 & 33 Vict. Chap c.
Sec. 96:

"... the harbourmaster or dockmaster may remove any wreck or other obstruction to the harbour, quays, docks or other approaches to the same; and also any floating timber which impedes the navigation thereof; and **the expense of removing any such wreck, obstruction or floating timber, shall be repaid by the owner of the same**, and the harbor-master or dockmaster may detain such wreck, obstruction or floating timber, for securing the expenses" etc.

Manchester Ship Canal Act, 1936, sec. 32

"(1) Whenever any vessel is sunk, stranded or abandoned in part of — (a) any river canal waterway navigable channel lock or dock forming part of the harbour and port of Manchester or of the undertaking ... the company may if they think fit cause the vessel to be raised or removed ...

"(2) **The company may recover from the owner of any such vessel all expenses** incurred by the company under this section in connection with that vessel ... as a debt in any court of competent jurisdiction.

"(6) In this connection the word 'owner' in relation to any vessel sunk stranded or abandoned as aforesaid means the owner of that vessel at the time of the sinking standing or abandonment thereof."

(copied from The STONEDALE NO. 1, [1954] 2 All E.R. 170, 173)

These local acts are by no means identical, one to another. *Sheppey Glue & Chemical Works, Ltd. v. Conservators of the River Medway*, 25 Ll. L. Rep. 32, 33.

However, there is a general statute of which these local bodies may take advantage

Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 Vict. c. 27, s. 56:

"The harbour-master may remove any wreck or other obstruction to the harbour, dock, or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof, and the expense of removing any such wreck, obstruction, floating timber shall be repaid by the owner of the same," etc. "

Canadian Statute

Revised Statutes of Canada, 1927 Ch. 140, Part II, which provides as follows:

Whenever, under the provisions of this Port, the Minister has caused

- (a) any signal or light to be placed and maintained to indicate the position of any obstruction or obstacle;
- (b) to be removed or destroyed any wreck, vessel or part thereof, or any other thing by reason whereof the navigation of any such navigable

waters was or was likely to become obstructed, impeded or rendered more difficult or dangerous; or

- (c) to be removed any vessel or part thereof, wreck or other thing cast ashore, stranded or left upon any public property belonging to his Majesty in the right of Canada;

and the cost of maintaining such signal or light or removing or destroying such vessel or part thereof, wreck or other thing has been defrayed out of the public moneys of Canada; and the net proceeds of the sale under this part of such vessel or its cargo, or the thing which caused or formed part of such obstruction are not sufficient to make good the cost so defrayed out of the public moneys of Canada, the amount by which such net proceeds falls short of the costs so defrayed as aforesaid, or the whole amount of such cost, if there is nothing which can be sold as aforesaid, shall be recoverable with costs by the Crown,

- (a) from the owner of such vessel or other thing, or from the managing owner or from the master or person in charge thereof at the time such obstruction or obstacle was occasioned; or
- (b) from any person through whose act or fault, or through the act or fault of whose servants such obstruction or obstacle was occasioned or continued.

2. Any sum so recovered shall form part of the Consolidated Revenue Fund of Canada, R.S., c. 115, s. 18, 1909, c. 28, s. 4.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.

FILED

AUG 23 1967

JOHN E. DAVIS, CLERK

NO. 31

IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

WYANDOTTE TRANSPORTATION CO., ET AL,
Petitioners

v.

UNITED STATES OF AMERICA, *Respondent*

BRIEF ON BEHALF OF THE
AMERICAN WATERWAYS OPERATORS, INC.
AND
LAKE CARRIERS' ASSOCIATION
AS AMICI CURIAE

E. D. VICKERY
OF ROYSTON, RAYZOR & COOK
877 San Jacinto Building
Houston, Texas 77002

ALEXANDER B. HAWES
OF LEVA, HAWES, SYMINGTON,
MARTIN & OPPENHEIMER
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

SCOTT H. ELDER
OF JOHNSON, BRANARD & JAEGER
1208 Terminal Tower
Cleveland, Ohio 44113
Counsel for Amici Curiae

INDEX

	Page
Consent of Parties	1
Statement of Interest	1
What is the Question?	2
Argument	6
Uniform Construction of Wreck Statute Entitled to Great Weight	6
Any change in Law Should Be Made by Con- gress and Not By Judicial Implication	8
Congress Did Not Overlook The Obvious	16
Congressional Silence Indicates Its Satisfaction With Wreck Statute	18
Conclusion	19
Certificate of Service	21
Appendix A	23

LIST OF AUTHORITIES

CASES	Page
Bisso v. Inland Waterways Corp., 1955, 349 U.S. 85, 99, 99 L.Ed. 911, 922, 75 S.Ct. 629	8
Consumers Import Co. v. Kabushiki Kaisha Ka- wasaki Zosenjo, 1943, 320 U.S. 249, 252, 253, 88 L.Ed. 30, 33, 64 S.Ct. 15	7
Graves v. New York, 1939, 306 U.S. 466, 479, 83 L.E. 927, 932, 59 S.Ct. 595	18
Loud v. United States, 6 Cir. 1923, 286 Fed. 56 The Manhattan, D.C. Pa. 1935, 10 F.Supp. 45, affd. 3 Cir. 1936, 85 F.2d 427, cert. den. sub nom, U. S. v. The Bessemer, 1937, 300 U.S. 654, 81 L.Ed. 864, 57 S.Ct. 432	3, 7
	7

II

CASES

	Page
Missouri v. Ross, 1936, 299 U.S. 72, 75, 81 L.Ed. 46, 49, 57 S.Ct. 60	6
U. S. v. Bethlehem Steel Corp. (The Texmar), 9 Cir. 1963, 319 F.2d 512, cert. den. 375 U.S. 966, 11 L.Ed.2d 415, 54 S.Ct. 484	7
U. S. v. Bridgeport Towing Line, Inc., D.C. Conn. 1926, 15 F.2d 240	7
U. S. v. Hall, 1 Cir. 1894, 63 F. 472	8
U. S. v. Moran Towing & Transportation Co., et al., 4 Cir. 1967, 374 F.2d 656	4
U. S. v. Ryan, 1931, 284 U.S. 167, 174, 76 L.Ed. 224, 228, 52 S.Ct. 65	6
U. S. v. Standard Oil Co. of California, 1947, 322 U.S. 301, 314, 91 L.Ed. 2067, 2075, 67 S.Ct. 1605, 1611	15
U. S. v. Wilson, 2 Cir. 1956, 235 F.2d 251	7
Zubic v. U. S., 3 Cir. 1951, 190 F.2d 278	7

MISCELLANEOUS

Harbors Act, Section 56, 1847 (10 & 11 Vict. c. 27)	17
House Report No. 1633, 88th Congress, 2d Section, entitled "Reimbursement of Government Expenditures for Removal of Hazardous Substances"	13
H.R. 11727 and H.R. 11822 (1964)	13
H.R. 2100 and H.R. 2842 (1965)	13
H.R. 17371 (1966)	13
H.R. 10593 (1967)	13
Report of Natural Resources & Power Subcommittee of the Committee on Government Operations of the House of Representatives	13
The Wreck Statute, 33 U.S.C.A. §§409, 414, 415, March 3, 1899	3, 4, 9, 14, 16, 18

NO. 31

IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

WYANDOTTE TRANSPORTATION CO., ET AL,
Petitioners

v.

UNITED STATES OF AMERICA, *Respondent*

**BRIEF ON BEHALF OF THE
AMERICAN WATERWAYS OPERATORS, INC.
AND
LAKE CARRIERS' ASSOCIATION
AS AMICI CURIAE**

To The Honorable Judges Of Said Court:

CONSENT OF PARTIES

All of the parties in this cause have given their written consent to the filing of this Brief *Amici Curiae*. Such written consent has been filed with the Clerk.

STATEMENT OF INTEREST

THE AMERICAN WATERWAYS OPERATORS, INC. is the national trade association that represents the

interests of, and includes in its membership, water carriers of all groups operating on United States inland waterways other than the Great Lakes. These groups include carriers that are regulated by the Interstate Commerce Commission, carriers exempt from such regulation but operating for-hire and private carriers not subject to such regulation. They range in size from owners of a single piece of equipment to the sixth largest water carrier (in terms of equipment) on such waterways.

LAKE CARRIERS' ASSOCIATION is a voluntary organization of owners and operators of vessels under the American Flag engaged in commerce on the Great Lakes. There are enrolled in the Association over 200 vessels documented under the laws of the United States. These vessels account for more than 98% of the total trip carrying capacity of all the American Flag vessels now engaged in domestic commerce on the Great Lakes.

Both of these associations, whose members are directly affected by the drastic change made in the law by the Court below, respectfully submit that the decision of the Court of Appeals is clearly wrong and should be set aside.

WHAT IS THE QUESTION?

Boiled down to its simplest terms, this case presents basically this single question to this Court for decision:

Having relied in making business decisions on the uniform application of the Wreck Statute by the federal courts for more than 43 years, is the American maritime industry to have a new and awesome economic burden imposed upon it for which Congress has not provided and which is directly contrary to

the heretofore uniform construction of the Wreck Statute by the federal courts?¹

The American Waterways Operators, Inc. and the Lake Carriers' Association, who represent all types of operators of marine equipment moving water borne commerce on our nation's rivers, inland waterways and the Great Lakes, respectfully submit that this question must be answered in the negative.

For more than sixty-five years those engaged in the transportation of water borne commerce in the United States have founded and operated their businesses relying on what was—at least until the decision in the Court below—the well-settled proposition that when disaster struck and one of their vessels was accidentally sunk, only the vessel and its cargo *in rem* could be held liable for the cost of removal if the Government of the United States determined that it was an impediment to navigation.

Relying on what had been the settled law of the land for these sixty-seven years, having planned the financial operations of their companies with this important economic fact seemingly well established, the American maritime industry finds itself confronted with a complete reversal of this settled principle of law by the decision of the Court below. Blandly brushing aside the most

1. The Wreck Statute, 33 U.S.C.A. #409, 414, 415, passed March 3, 1899, was first subjected to judicial construction on the cost of the removal of a sunken vessel in 1923 in *Loud v. United States*, 6 Cir. 1923, 286 Fed. 56. Thus, for 24 years no attempt was made to impose *in personam* liability on a vessel owner for removal costs, so it would not be inaccurate to say that the American maritime industry had relied on the uniform application of the Wreck Statute for more than 67 years prior to the decision of the Court below.

important and significant economic fact—that the industry is completely unprepared to meet any such new economic burdens—the Court below proceeded to create and impose on the American maritime industry an entirely new liability whose awesome economic potentials are dramatically demonstrated by the alleged cost of removal of the barge Wychem 112 of \$3,081,000.00 in this case.

Acknowledging as it had to do, that Congress did not “authorize a suit by the Government for the recovery of removal expenses” the Court below nevertheless “implied” such authority.² This it did in the face of the refusal to do so by 11 other federal courts to whom the government apparently had made such a request over the last 43 years.³ Since the decision of the Court below, still another Court, the Court of Appeals for the Fourth Circuit, has declined to thus amend the Wreck Statute.⁴

In disregarding all this judicial precedent and in so amending the statute, the Court below failed to properly consider and evaluate the following factors:

1. That the uniform construction of the Wreck Statute for 43 years by the federal courts is entitled to great

2. R. 158, 367 F.2d 971, at page 976.

3. It is interesting to note that prior to the decision of the Court below the government's request for such a judicial amendment of the Wreck Statute had been considered by 7 different United States District Judges and by 17 different United States Circuit Judges, a total of 24 different federal judges. Until the decision of the Court below in this case, 23 of these 24 federal judges had declined to so amend the statute and only 1 judge concluded that the government's request had any merit at all.

4. *United States v. Moran Towing & Transportation Co., et al*, 4 Cir. 1967, 374 F.2d 656.

weight and is not to be lightly set aside and disregarded.⁵

2. That any such change in the law, which involves such awesome economic implications for the American maritime industry, should come, not by judicial implication, but from Congressional enactment. This for the reason that it is only through the legislative process that the best interests of all those directly concerned—the national government, state and local governments, the maritime industry, and the people of the United States—can be fully and adequately considered to insure that only those changes in the statute which are fair to all will be enacted by the elected representatives of the people.⁶
3. That the Wreck Statute expressly provides that the expenses of removing a wreck “shall be a charge against such craft and cargo” only, and to hold that these expenses are a personal charge against a party negligently causing a vessel to sink is to hold, 68 years after the fact, that Congress overlooked this most obvious of remedies.⁷
4. That Congress has not seen fit to amend the Wreck Statute to provide for the personal remedy the government here seeks is strong evidence that Congress is completely satisfied with the statute it enacted 68 years ago and the uniform judicial interpretations of it for the past 43 years.⁸

5. See full discussion, *infra*, pages 6 to 8.

6. See full discussion, *infra*, pages 8 to 16.

7. See full discussion, *infra*, pages 16 to 17.

8. See full discussion, *infra*, pages 18 to 19.

We now turn to a separate consideration of each of these important factors.

ARGUMENT

UNIFORM CONSTRUCTION OF WRECK STATUTE ENTITLED TO GREAT WEIGHT

This Court has stated on many occasions that the uniform construction of a statute by the lower federal courts is not to be lightly regarded and is to be set aside only with much hesitation and reluctance:

"... we should *hesitate to set aside*, at this late date, the *uniform construction* given to the section with respect to this question by the *lower federal courts for more than sixty years*." (Emphasis supplied)⁹

"... The decision in that case was made nearly *thirty years ago*, since which time the *lower federal courts have almost unanimously followed* the rule there stated. . . . These decisions are plainly correct; but, if they were doubtful, we *should at this late date hesitate to disturb them*. . . ." (Emphasis supplied)¹⁰

While purporting to subject its "reading of the statutes" to the "light of the cases decided under the Act",¹¹ the Court below nevertheless completely ignored the undeniable fact that every court before it who had been asked the question:

9. *U.S. v. Ryan*, 1931, 284 U.S. 167, at page 174, 76 L.Ed. 224, at page 228, 52 S.Ct. 65.

10. *Missouri v. Ross*, 1936, 299 U.S. 72, at page 75, 81 L.Ed. 46, at page 49, 57 S.Ct. 60.

11. R. 158, 367 F.2d 971, at page 976.

Can the government recover the costs of removal of a sunken vessel from a party *in personam* if that party's negligence contributed to the sinking?

had answered it with an emphatic no.¹²

Had the Court below followed the admonitions of this Court, that the uniform construction of a statute by other federal courts is entitled to careful consideration and is to be overturned only with reluctance, it too would have answered the question in the negative. Mr. Justice Jackson reiterated the rule in 1943 thusly:

"The provision here in controversy is #1 of the Act of March 3, 1851. Despite its all but a century of existence, the contention here made has never been before this court. . . .

.....
 "In the meantime, with the exception of *The Etna Maru*, the lower federal courts have uniformly construed the statutes. . . . We would be reluctant to overturn an interpretation supported by such consensus of opinion among courts of admiralty, even if its justification were more doubtful than this appears."¹³

12. *Loud v. U.S.*, 6 Cir. 1923, 286 Fed. 56; *U.S. v. Bridgeport Towing Line, Inc.*, D.C. Conn. 1926, 15 F.2d 240; *The Manhattan*, D.C. Pa. 1935, 10 F.Supp. 45, affirmed 3 Cir. 1936, 85 F.2d 427, cert. den. *sub nom. United States v. The Bessemer*, 1937, 300 U.S. 654, 81 L.Ed. 864, 57 S.Ct. 432; *Zubic v. U.S.*, 3 Cir. 1951, 190 F.2d 278; *U.S. v. Wilson*, 2 Cir. 1956, 235 F.2d 251; *U.S. v. Zubic*, 3 Cir. 1961, 295 F.2d 53; *U.S. v. Bethlehem Steel Corporation (The Texmar)*, 9 Cir. 1963, 319 F.2d 512, cert. denied 375 U.S. 966, 11 L.Ed.2d 415, 54 S.Ct. 484.

13. *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*, 1943, 320 U.S. 249, at page 252, 253, 88 L.Ed. 30, at page 33, 64 S.Ct. 15.

Notwithstanding its 67 years of existence, and its 43 years of uniform construction by other federal courts without exception, the Court below declined to follow this well-settled interpretation of the Wreck Statute. It was clearly wrong for it to do so, and especially so when such a change in the law involves such serious economic implications not only for the American maritime industry but for the general public as well.

**ANY CHANGE IN LAW SHOULD
BE MADE BY CONGRESS AND
NOT BY JUDICIAL IMPLICATION**

By Congressional enactment and judicial interpretation for some 67 years the well established rule has been—no one is liable *in personam* for the costs of removing sunken vessels even though some negligence contributed to the sinking.¹⁴

“ . . . a long established rule, not remotely related to any constitutional question and readily amenable to legislative change should be adhered to. Especially in the domain of commercial affairs, stare decisis has a strong social justification. In conducting their affairs, men naturally assume that courts will not unsettle a settled rule for the conduct of business, certainly not unless experience has made manifest the need for overturning the law.” (Emphasis supplied)¹⁵

14. *In personam* liability has been imposed only where the vessel has been deliberately and willfully sunk as in *United States v. Hall*, 1 Cir. 1894, 63 F. 472.

15. *Bisso v. Inland Waterways Corporation*, 1955, 349 U.S. 85, at page 99, 99 L.Ed. 911, at page 922, 75 S.Ct. 629. Although this quotation is from Mr. Justice Frankfurter's dissenting opinion, it accurately reflects the view of the entire court. His dissent from the holding of the majority was based on a difference of opinion as to what was the established rule.

Since the very crux of the controversy here is a long established legal principle, since it is not remotely related to any constitutional question, and since it is quite readily amenable to legislative change, we respectfully submit that the Court below erred in amending the Wreck Statute by implying into it a remedy which Congress had not provided. This is especially true, where as here, so many different groups have a direct interest in the economics of the decision. The Court below recognized the interests of the government of the U. S., the state and local governments along our inland waterways system, those who transport commerce on the waterways and in fact the interest of all of the people in these important national assets. It recognized that vast sums of money have been spent to make these waterways suitable for modern commerce and to maintain them. But from these acknowledged facts the Court below proceeded full speed ahead to the conclusion that the national interest in these waterways would be best served if it amended the Wreck Statute to make it provide for *in personam* liability for the cost of removing sunken vessels.¹⁶

16. And in so amending #15 of the Wreck Statute (33 U.S.C.A. #409), the Court below did so on a very select basis—*in personam* liability is to be imposed only if a party is negligent. Yet the statute says the *in rem* liability of the sunken craft for removal costs exists whether the craft is sunk "accidentally or otherwise". Since the statute imposes *in rem* liability on the sunken craft whether negligently or innocently sunk, on what logical basis can the Court below imply that Congress intended to impose *in personam* liability only if the craft was negligently sunk? Logically it can't, for Congress treated both the innocent and the negligent alike in providing for *in rem* liability of the craft. If Congress was wrong, the correction of the statute should be made by the Congress and not by a court speculating on what Congress intended when it enacted a statute 68 years ago.

The Court below rushed to this conclusion apparently on the assumption that the owners of the sunken craft here were financially able to stay in business even if the settled law is changed and they must pay the \$3,081,000.00 in removal costs. But in so doing, the Court below completely lost sight of the vast majority of the marine operators in the United States. Its decision can not be limited just to relatively large marine operators, but of necessity must be applied to the smallest boat operator, whether a fishing boat, an offshore crew boat, a sand or shell barge, or a pleasure craft of whatever kind of description. The imposition of *in personam* liability on the owners of the sunken craft in these cases also means the imposition of *in personam* liability on all vessel operators of whatever kind or size they might be.

Without taking an extreme example, the devastating impact of the holding of the Court below can be easily demonstrated. There are approximately 1,700 companies operating on domestic waterways, not counting those on the Great Lakes. These companies have a total of approximately 3,865 tow boats and tugs and approximately 17,085 barges and scows, or a total of approximately 20,950 pieces of marine equipment. Of this total, approximately one-third of all of the equipment is owned by 27 companies. The other two-thirds of these vessels are owned by the remaining 1,673 companies.¹⁷ Obviously, there are a number of marine operators transporting goods on the domestic waterways of the United States who own only one or two pieces of marine equipment. The loss of one or more of these few pieces of equipment would

17. Statistics compiled from Corps of Engineers Transportation Series 4 (Transportation Lines on the Mississippi River System and the Gulf Intercoastal Waterway) and Transportation Series 5 (Transportation Lines on the Atlantic, Gulf and Pacific Coasts).

be a disaster indeed to these small operators, but what would be even more disastrous would be for them to be confronted with a claim from the government for \$3,000,000.00 for the costs of the removal of a piece of equipment that had been accidentally sunk.¹⁸ This would be piling disaster upon disaster. If the economic loss of their vessel didn't put them out of business, the government's claim would. And make no mistake, there are many small operators who have their life's savings invested in a fishing boat or a crew boat or a tug or a barge to whom such a claim by the government would be catastrophic.¹⁹

Of course, what all of this dramatically demonstrates is the obvious fact that it is only in the Congress that all of the economic facts can be fully developed, that all of the interested parties can be heard and their positions evaluated by the elected representatives of the people. And it is in the Congress that our country's long established policy of encouraging and fostering the full development of domestic water transportation can be evaluated—a policy which has been directly responsible for the economic, commercial and industrial development of most sections of the United States.

As the Court below stated, vast sums are spent by the government for the development of our waterways, but these sums are not spent just to provide commercial

18. For some operators, even 1% of this amount, \$30,000.00, would mean the end of their business and perhaps their life's savings.

19. Even as to the larger operators the amounts involved on a single trip are astronomical with the movement of expensive and unusual cargoes in the national interest and for defense purposes. A good example of such cargoes is the Saturn booster rockets which are transported on the waterways from Huntsville, Alabama to Cape Kennedy, Florida.

marine operators with a highway on which to transport the goods of other companies. Rather these vast sums are spent for many purposes in the national interest, such as flood control, and because of the vast importance of these domestic waterways to the economic development and the economic health of this country. Nor is this a policy of recent origin but rather it is one that has been the settled policy of our government almost since the founding of this nation. Thus, it is substantially all of the people of this country who benefit from the development and maintenance of our domestic waterways. It is their best interests which must be considered and evaluated in answering the question presented here. Through no fault of its own or of any of the parties, on a record that consisted only of the pleadings and a few affidavits, the Court below simply did not, and could not, have had the facts necessary to make such an evaluation even had this been its proper function.

The proper evaluation of these multiple economic and political factors can be made only in the Congress for as this case shows, it is simply impossible for all of these factors to be presented to a Court for its consideration. And even if they could all be presented to a Court, it is still the Congress which is charged with these legislative or policy making functions in our system of government.

The impossibility of any Court being able to obtain all of the information needed to properly evaluate all necessary factors on a matter such as this is graphically demonstrated by the recent extensive hearings of a Congressional committee on this and related matters. These hearings were held from May, 1963 to May, 1964 not only in Washington, D.C., but in many other cities throughout the country as well. The transcript of these

hearings is contained in nine volumes.²⁰ The impossibility of a Court obtaining such broad and all encompassing information from all over the country is obvious.

* Following these extensive hearings, the committee issued its report on July 29, 1964.²¹ This report recognized that the Rivers & Harbors Act of 1899 did not permit *in personam* recoveries of removal costs by the government and recommended the amendment of the Act to specifically permit the government to make such *in personam* recoveries. Apparently as a result of these hearings, some of the members of the committee have introduced bills in the House of Representatives adopting the draft of the bill which was attached to the committee report. Two such bills were introduced in 1964, two in 1965, one in 1966 and one in 1967.²² Each of these bills was referred to the Committee on Public Works of the House of Representatives. That committee has asked for the comments of the various federal departments and agencies who have an interest in this matter and is presently awaiting such comments. The committee's draft bill and each of the bills actually introduced in the House of Representatives specifically provide that the government can recover the cost of removal of a sunken vessel if the

20. These hearings were held by the Natural Resources & Power Subcommittee of the Committee on Government Operations of the House of Representatives.

21. House Report No. 1633, 88th Congress, 2d Session, entitled "Reimbursement of Government Expenditures for Removal of Hazardous Substances."

22. H.R. 11727 and H.R. 11822 were introduced in 1964, H.R. 2100 and H.R. 2842 were introduced in January, 1965, H.R. 17371 was introduced in August, 1966 and H.R. 10593 was introduced in June, 1967.

sinking results from the owner's willful act or negligence.²³ Thus this matter of *in personam* liability for removal costs has been the subject of Congressional inquiry and consideration for the past several years, but to date the Congress has not seen fit to take any action other than to leave the matter under consideration by the Committee on Public Works. And this even though it is fully aware that it is annually appropriating money to pay removal costs without being able to recover them *in personam*. If the statute is to be amended, the Congress should do it only after careful consideration leads it to a decision that such a change would truly be in the national interest in this area.

With a candor that is refreshing, the government has stated the issue to be "whether the cost of removing vessels negligently sunk must be borne by the tortfeasor rather than the Public Treasury".²⁴ It asks that what the government has been paying under the Congressional directive of the Wreck Statute for 68 years, be passed on to whoever may negligently sink a vessel by creating a new tort liability. Thus, the issue, as the government concedes, is really one of federal fiscal policy, which, as this Court has always recognized, rests exclusively in the hands of Congress and not in the hands of the federal courts.

"Moreover, as the Government recognizes for one phase of the argument but ignores for the other, we have not here simply a question of creating a new liability in the nature of a tort. For grounded though

23. A copy of the draft of the bill from the House Report is printed as Appendix A to this brief, *infra*, page 23.

24. Memorandum For The United States on Petition for a Writ of Certiorari, page 1.

the argument is in analogies drawn from that field, the issue comes down in final consequence to a question of federal fiscal policy, coupled with consideration concerning the need for and the appropriateness of means to be used in executing the policy sought to be established. The tort law analogy is brought forth, indeed, not to secure a new step forward in expanding the recognized area for applying settled principles of that law as such, or for creating new ones. It is advanced rather as the instrument for determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not covered by traditionally established liabilities.

"Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court or the other federal courts, is the custodian of the national purse."²⁵

The American maritime industry from the smallest to the largest operator, has made its business commitments, has fixed its rates and planned for a reasonable profit relying on the settled rule under the Wreck Statute that when disaster struck and one of its vessels was sunk, its maximum business loss would be the craft and its cargo. Industry assumed, and justifiably, that any change in this settled rule would be made by the Congress who had established the rule in the first place. And this only after Congress, in the deliberate legislative process, had determined what was in the best interest of this nation—a nation whose economic, commercial and industrial development has been so dependent on the development

25. *United States v. Standard Oil Company of California*, 1947, 322 U.S. 301, at page 314, 91 L.Ed. 2067, at page 2075, 67 S.Ct. 1605, at page 1611.

of its domestic water borne commerce. It is respectfully submitted that the drastic change in the law made by the Court below, with its imposing economic aspects, so far invades the legislative province of the Congress that it should not be permitted to stand.

CONGRESS DID NOT OVERLOOK THE OBVIOUS

When a vessel is wrecked and sinks in such a way as to impede the navigation of our nation's waterways, there are only three possible sources for payment of the cost of removal:

1. The craft and cargo *in rem*.
2. *In personam* from parties whose negligence might have caused the sinking.
3. The government as a part of its function in promoting the national interest.

When Congress passed the Wreck Statute in 1899, it had to determine which of these three sources, or combinations of them, should pay for the cost of removal of sunken craft in the navigable waterways.

Congress decided that if the owner abandoned the craft, the government should pay for the cost of removal, but with these costs of removal being a "charge against such craft and cargo."²⁶ The Court below added to the statute by implication that these costs of removal were also a charge "against the owner if the vessel was negligently sunk." For the Court below to so conclude, it had to assume that the failure of the Congress to add these

26. Section 20 of Wreck Statute, 33 U.S.C.A. #415.

words to the statute was either (1) an inadvertent oversight in drafting the statute or (2) that the Congress had overlooked the most obvious potential source for reimbursement of removal costs expended by the government.²⁷

We do not believe either assumption has any merit at all, for the simple reason that only a few words added to the statute would have provided the remedy the government asks this Court to approve and because an *in personam* remedy against a party whose negligence caused the sinking was the most obvious of all possible remedies. Additionally, perhaps the leading maritime nation of the world at that time, England, had specific legislation which provided both an *in personam* remedy against the owner and an *in rem* remedy against the wreck.²⁸

With the imposition of *in personam* liability so easy and simple of accomplishment, and with Congress providing for only *in rem* liability of the craft and cargo, we respectfully submit that 68 years later a contrary intent of the Congress should not be read into the statute.

27. But even if one of these assumptions is correct, who should correct the oversight? Obviously, the Congress and not the courts.

28. "The harbour master may remove any wreck or other obstruction to the harbour, dock or pier, or the approaches to the same and also any floating timber which impedes the navigation thereof, and the expense of removing any such wreck or floating timber shall be repaid by the owner of the same, and the harbour master may detain any such wreck or floating timber for securing the expenses, and upon nonpayment of such expenses, on demand, may sell such wreck or floating timber, and out of the proceeds of such sale pay such expenses, rendering the overplus, if any, to the owner on demand." (Emphasis supplied) Section 56, Harbors Act, 1847 (10 & 11 Vict. c. 27).

CONGRESSIONAL SILENCE INDICATES ITS SATISFACTION WITH WRECK STATUTE

Not too many years ago this Court said:

"It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. The nature and extent of that implication depends upon the nature of the Congressional power and the effect of its exercise."²⁹

No more appropriate situation for the application of this statement than the present case could be found. Only one possible implication from the silence of Congress for 68 years can reasonably be drawn—it is completely satisfied with the Wreck Statute passed in 1899 and its uniform construction by the courts since 1923. The nature of the Congressional power in this area is absolute for it is charged with the responsibility of protecting the navigable waters of the United States and the commerce upon them. This is particularly true as to impediments or obstructions to navigation to which it addressed itself in the Wreck Statute and the other sections of the Act of March 3, 1899.

The fact that the government has been paying for the cost of removal of sunken vessels from our waterways since the passage of the Wreck Statute is a fact of which Congress has been fully aware on an annual basis. It is fully aware of this fact each year as it appropriates the necessary money to permit the Corps of Engineers to remove these vessels as it is required to do by the Wreck

29. *Graves v. New York*, 1939, 306 U.S. 466, at page 479, 83 L.Ed. 927, at page 932, 59 S.Ct. 595.

Statute. Thus it cannot be said that this aspect of the statute has not come to the attention of the Congress, since the statute was passed, for it has come to its attention annually.³⁰

Not having seen fit to amend the Wreck Statute for more than 68 years to provide an *in-personam* remedy against the owner of a sunken craft in addition to the *in rem* remedy it had already provided, this Congressional silence clearly indicates that its purpose in enacting the Wreck Statute was to permit the cost of removal to be recoverable only from the craft and cargo *in rem*. Its silence, while annually appropriating the necessary money to pay the removal costs not recouped through the *in rem* remedy, is subject to no other reasonable interpretation.

CONCLUSION

We respectfully submit that the decision of the Court of Appeals should be reversed and that of the District Court affirmed because:

1. The uniform construction of the Wreck Statute by the federal courts for 43 years should not have been disregarded.
2. Any change in the law, such as that attempted to be made by the Court of Appeals below, with its awesome economic consequences for the American maritime industry, should be made only by the Congress through its careful, deliberative process where what is truly in the national interest may best be determined.

30. Of course as previously pointed out, *supra*, pages 12 to 14, this has also been the subject of Congressional inquiry in recent years.

3. Congress expressly provided that the costs of removal were chargeable only to the craft and cargo *in rem*, and it cannot reasonably be inferred that it overlooked the obvious when it did not provide for *in personam* liability.
4. Congress not having seen fit to amend the Wreck Statute since its enactment 68 years ago while annually appropriating funds to pay removal costs, the only reasonable inference to be drawn from its silence is that Congress is satisfied with its provision for *in rem* liability only and does not desire for the government to have the *in personam* remedy which it here seeks.

Respectfully submitted,

E. D. VICKERY
OF ROYSTON, RAYZOR & COOK
877 San Jacinto Building
Houston, Texas 77002

ALEXANDER B. HAWES
OF LEVA, HAWES, SYMINGTON,
MARTIN & OPPENHEIMER
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

SCOTT H. ELDER
OF JOHNSON, BRANARD & JAEGER
1208 Terminal Tower
Cleveland, Ohio 44113
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief *Amici Curiae* have been served on the attorneys for all parties herein by depositing the same in a United States mail box with first class air mail postage prepaid, addressed to counsel of record at the following post office addresses on this the _____ day of August, 1967.

Lucian Y. Ray
William D. Carle III of
McCreary, Hinslea & Ray
1550 Union Commerce
Building
Cleveland, Ohio 44115
and

Benjamin W. Yancey,
Alfred M. Farrell, Jr. of
Terriberry, Rault, Carroll,
Yancey & Farrell
2141 International Trade
Mart Building
New Orleans, Louisiana
70130

*Attorneys for Wyandotte
Transportation Company*

George B. Matthews of
Lemle & Kelleher
1836 National Bank of
Commerce Building
New Orleans, Louisiana
70112

*Attorneys for Union Barge
Line Corporation*

Tom F. Phillips of
Taylor, Porter, Brooks,
Fuller & Phillips
Louisiana National Bank
Building
Baton Rouge, Louisiana
70801

and
J. Barbee Winston of
Phelps, Dunbar, Marks,
Claverie & Sims
Hibernia Bank Building
New Orleans, Louisiana
70112

*Attorneys for Cargill, Inc.,
et al*

Hon. Thurgood Marshall
Solicitor General of the
United States
Washington, D.C. 20530

Hon. Barefoot Sanders,
Assistant Attorney General
Department of Justice
Washington, D.C. 20530

Hon. Alan S. Rosenthal,
Attorney
Department of Justice
Washington, D.C. 20530

Hon. Martin Jacobs,
Attorney
Department of Justice
Washington, D.C. 20530

Attorneys for United States

E. D. VICKERY
OF ROYSTON, RAYZOR & COOK

APPENDIX A

The committee suggests the following draft of bill for consideration by the appropriate House committee:

A BILL TO amend the Act of March 3, 1899, to authorize the United States to recover by civil actions the cost of removing certain obstructions from the navigable waters of the United States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 16 of the Act entitled "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899, as amended (33 U.S.C. 412), is amended by inserting "(a)" immediately after "Sec. 16.", and by adding at the end of such section the following new subsection:

"(b) Any person (i) who violates section 10, 11, 13, or 15 of this Act, or (ii) who is the owner of any boat, ship, vessel, barge, raft, or other watercraft or other similar obstruction which is subject to removal or destruction under section 19 or 20 of this Act (including the charterer of any vessel who mans, victuals, and navigates such vessel at his own expense or by his procurement), or (iii) who is the owner of any cargo on any such sunken or grounded boat, ship, vessel, barge, raft, or other watercraft, shall be liable to the United States in a civil action brought by the United States for all reasonably necessary costs incurred by the United States in removing the obstruction, refuse matter, material, deposit, cargo, boat, ship, vessel, barge, raft, or other watercraft, as the case may be, from the navigable waters of the United States: *Provided, however,* That such violation, obstruction, sinking, or grounding (1) resulted from

such person's violation of the aforesaid sections of this Act or from his willful act or negligence, and also (2) resulted in impeding or endangering navigation, or the life or property of persons using the navigable waters of the United States, or substantially endangering desirable marine, aquatic, or other plant or animal life of the navigable waters of the United States, or substantially impairing the usefulness of any navigable waters of the United States. The liability imposed by this subsection shall be in addition to any remedy, penalty, or forfeiture otherwise provided in this Act or any other law, except that any amounts covered into the Treasury of the United States under section 19 or 20 of this Act as the result of removing any boat, ship, vessel, barge, raft, or other watercraft or other similar obstruction, or the cargo thereof, shall be set off against any reimbursement obtained by the United States under this section for its costs in connection with the removal thereof."

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes and regulations involved	2
Question presented	2
Statement	2
1. The WYCHEM action	2
2. The <i>Cargill</i> action	5
3. The decisions below	7
Summary of Argument	8
Argument	10
I. The Rivers and Harbors Act of 1899 prohibits the negligent sinking of a vessel in a navigable river and requires those responsible to remove the vessel or pay the cost of removal	10
A. Petitioners are personally liable under Section 10 of the Act for the negligent sinking	11
B. Petitioners are personally liable under Section 15 of the Act for the negligent sinking	19
C. Petitioners cannot avoid personal liability for their negligence by abandoning the wreck	21
II. Apart from statutory law, those responsible for the negligent sinking of a vessel in navigable waters are required to remove the vessel or pay the cost of removal	40
A. The Rivers and Harbors Act does not preempt non-statutory grounds of liability	40
B. Petitioners' negligence created public nuisances which they must abate or pay the cost of abating	45
C. The United States is entitled to compel abatement of a nuisance in navigable waters or to recover the costs of abatement	48

Conclusion.....	51
Appendix.....	53

CITATIONS

Cases:

<i>American Car & Foundry Co. v. Brassert</i> , 289 U.S. 261.....	27
<i>American Trucking Ass'ns v. Atchison T. & S.F. Ry.</i> , 387 U.S. 397.....	37
<i>Attorney-General v. Earl of Lonsdale</i> , 20 L.T. 64 (V.C. 1868).....	45
<i>Attorney-General v. Johnson</i> , 2 Wils. Ch. 87, 37 Eng. Rep. 240 (Ch. 1819).....	48
<i>Attorney-General v. Parmeter</i> , 10 Price 378 (Ex. 1811), affirmed <i>sub nom. Parmeter v. Gibbs</i> , 10 Price 412 (H.L. 1813).....	45
<i>Attorney-General v. Terry</i> , L.R. 9 Ch. 423 (Ch. App. 1874).....	45
<i>Ball v. Berwind</i> , 29 Fed. 541.....	22
<i>Barclay v. Commonwealth</i> , 25 Pa. 503.....	45
<i>Bisso v. Inland Waterways Ass'n</i> , 349 U.S. 85.....	24
<i>Boston & Hingham Steamboat Co. v. Munson</i> , 117 Mass. 34.....	24, 45, 46
<i>Brown v. Mallett</i> , 5 C.B. 599, 136 Eng. Rep. 1013 (Com- mon Pleas 1848).....	22, 24, 25
<i>Carver v. San Pedro, L.A. & S.L.R.</i> , 151 Fed. 334.....	44
<i>City of Bangor, The</i> , 13 F. Supp. 648.....	27
<i>City of Concord v. Burleigh</i> , 67 N.H. 106, 36 Atl. 606.....	45
<i>City of Harrisonville v. W. S. Dickey Clay Mfg. Co.</i> , 61 F. 2d 210, reversed on other grounds, 289 U.S. 334.....	45
<i>City of Newark, The v. Mills</i> , 35 F. 2d 110, certiorari denied, 281 U.S. 722.....	21, 27
<i>Coosaw Mining Co. v. South Carolina</i> , 144 U.S. 550.....	48
<i>Coryell v. Phipps</i> , 317 U.S. 406.....	28
<i>Cotton v. United States</i> , 11 How. 228.....	47
<i>Craig v. Continental Ins. Co.</i> , 141 U.S. 638.....	28
<i>Crystal, The</i> , [1894] A.C. 508, [1891-1894] All E.R. 804 (H.L.).....	22, 41
<i>Dann v. Studebaker-Packard Corp.</i> , 288 F. 2d 201.....	14
<i>DeBardalebem Coal Co. v. Cox</i> , 16 Ala. App. 172, 76 So. 409, certiorari denied, 76 Ala. 553, 76 So. 911.....	24
<i>Debs, In re</i> , 158 U.S. 564.....	43, 47, 48
<i>Dee Conservancy Board v. McConnell</i> , [1928] 2 K. B. 159, [1928] All E.R. 554 (C.A.).....	23, 41

III

Cases—Continued

<i>Eastern Transportation Co., In re</i> , 102 F. Supp. 913, affirmed on other grounds <i>sub nom. Ottenheimer v. Whitaker</i> , 198 F. 2d 289	Page 16, 20, 23, 35
<i>Ella, The</i> , [1915] P. 111	22, 44, 46
<i>F. S. Royster Guano Co. v. Outen</i> , 226 Fed. 484	44
<i>Federal Housing Administration v. The Darlington, Inc.</i> , 358 U.S. 84	39
<i>Federal Trade Commission v. Dian Foods Co.</i> , 384 U.S. 597	37
<i>Gilman v. Philadelphia</i> , 3 Wall 713	48
<i>Gulf Coast Transp. Co. v. Ruddock-Orleans Express Co.</i> , 17 F. 2d 858	22, 34
<i>Hagen v. City of Richmond</i> , 254 Va. 723, 52 S.E. 385	28, 36
<i>Hancock v. York, Newcastle & Berwick Ry.</i> , 10 C.B. 348 (1850)	22, 24
<i>Helvering v. Hallock</i> , 309 U.S. 196	37
<i>Henderson's Tobacco</i> , 11 Wall. 652	42
<i>Highland Corp., In re</i> , 24 F. 2d 582, affirmed, 29 F. 2d 37	21, 26, 28
<i>Irving F. Ross, The</i> , 8 F. 2d 313	28
<i>J. I. Case Co. v. Borak</i> , 377 U.S. 426	14
<i>King v. Russell</i> , 9 D & R 566 (K.B. 1827)	45
<i>King v. Ward</i> , 6 Ad. & El. 384 (K.B. 1836)	44
<i>King v. Watts</i> , 2 Esp. 675, 170 Eng. Rep. 493 (Assizes 1798)	25, 45
<i>Liverpool (No. 2), The</i> , [1960] 3 All E.R. 307 (Ct. Appl.)	41, 46
<i>Loud v. United States</i> , 286 F. 2d 56	16
<i>Manhattan, The</i> , 3 F. Supp. 75, 10 F. Supp. 45, affirmed, 85 F. 2d 427, certiorari denied <i>sub nom. United States v. The Bessemer</i> , 300 U.S. 654	16, 20, 24, 26
<i>Mayor et al. of Georgetown v. Alexandria Canal Co.</i> , 12 Pet. 91	44, 45
<i>Miller v. Chatterton</i> , 46 Minn. 338, 48 N.W. 1109	45, 46
<i>North Bloomfield Gravel Mining Co. v. United States</i> , 88 Fed. 664	14, 48, 49
<i>Norwich Co. v. Wright</i> , 13 Wall. 104	27
<i>Orrell v. Wilmington Iron Works</i> , 89 F. Supp. 418, reversed in part on other grounds and affirmed in part, 185 F. 2d 181	21, 22, 24

IV

Cases—Continued

	Page
<i>Pennsylvania, The</i> , 19 Wall. 125-----	28
<i>Pennsylvania v. Wheeling & Belmont Bridge Co.</i> , 13 How. 518-----	48
<i>People v. Gold Run Ditch & Mining Co.</i> , 66 Cal. 138, 4 Pac. 1152-----	45, 46
<i>People v. Vanderbilt</i> , 26 N.Y. 287-----	40
<i>Petition of Boat Demand, Inc., In the Matter of the</i> , 174 F. Supp. 668-----	22, 23, 36, 46
<i>Piscataqua Navigco Co. v. New York, N.H. & H.R.</i> , 89 Fed. 362-----	46
<i>Port Hunter, The</i> , 6 F. Supp. 1009-----	34
<i>Plymouth, The</i> , 3 Wall. 20-----	46
<i>Reitmeister v. Reitmeister</i> , 162 F. 2d 691-----	14
<i>Rose v. Miles</i> , 4 Miles & Selwyn 101 (K.B. 1815)-----	44, 46
<i>Sanitary District v. United States</i> , 266 U.S. 405. 12, 14, 47, 48	
<i>Scotland, The</i> , 105 U.S. 24-----	24, 27
<i>Snug Harbor, The</i> , 53 F. 2d 407, affirmed <i>sub nom.</i>	
<i>United States v. Eastern Transp. Co.</i> , 59 F. 2d 984-----	27
<i>Spenser Kellogg & Sons v. Hicks</i> , 285 U.S. 502-----	28
<i>State of Texas v. Goodnight</i> , 70 Tex. 682, 11 S.W. 119-----	45
<i>Stinson v. Wyman</i> , 23 Fed. Cas. 108-----	27
<i>Stonedale No. 1, The</i> , [1955] 2 All E.R. 689 (H.L.)-----	27, 41
<i>Swan, The</i> , 23 Fed. Cas. 495-----	22
<i>Taylor v. Atlantic Mutual Ins. Co.</i> , 37 N.Y. 275-----	22, 24
<i>Texas & Pac. R. v. Rigsby</i> , 241 U.S. 33-----	14
<i>Tyne Improvement Comm'rs v. Armement Anverssois S/A</i> , [1949] A.C. 326, [1949] 1 All E.R. 294 (H.L.)-----	12
<i>Udall v. Tallman</i> , 380 U.S. 1-----	39
<i>United States v. Bethlehem Steel Co. (The Texmar)</i> , 319 F. 2d 512, certiorari denied, 375 U.S. 966-----	10,
11, 16, 19, 20, 24, 34	
<i>United States v. Bethlehem Steel Co.</i> , 374 F. 2d 656, certiorari pending, No. 130, October Term, 1967---	11,
15, 16, 17, 20, 24, 34, 35, 36	
<i>United States v. Bridgeport Towing Line, Inc.</i> , 15 F. 2d 240-----	16
<i>United States v. Duluth</i> , 25 Fed. Cas. 923 (No. 15,001)-----	49
<i>United States v. Du Pont & Co.</i> , 353 U.S. 586-----	37
<i>United States v. Hall</i> , 63 Fed. 472-----	12, 16, 35, 45, 48
<i>United States v. Mississippi and Rum River Boom Co.</i> , 3 Fed. 548-----	49

Cases—Continued

<i>United States v. New York Central R. Co.</i> , 252 F. Supp.	Page
508, affirmed <i>per curiam</i> , 358 F. 2d 747	15, 16
<i>United States v. North Bloomfield Mining Co.</i> , 53 Fed.	
625	49
<i>United States v. Perma Paving Co.</i> , 332 F. 2d 754	14, 15, 20, 50
<i>United States v. Republic Steel Corp.</i> , 362 U.S. 482	7,
8, 10, 12, 13, 14, 17, 19, 20, 36, 38, 41, 43, 47, 48	
<i>United States v. Rio Grande Irrigation Co.</i> , 174 U.S.	
690	12
<i>United States v. San Jacinto Tin Co.</i> , 125 U.S. 273	14,
	47, 48, 49
<i>United States v. Standard Oil</i> , 384 U.S. 224	17
<i>United States v. State Road Department of Florida</i> , 189	
F. 2d 591, certiorari denied, 342 U.S. 903	50
<i>United States v. Wilson</i> , 235 F. 2d 251	13, 16, 20
<i>United States v. Wishkah Boom Co.</i> , 136 Fed. 42, appeal	
dismissed, 202 U.S. 613	13
<i>United States v. Zubik</i> , 295 F. 2d 53	15, 16, 20
<i>Viebahn v. Board of County Comm'rs</i> , 96 Minn. 276,	
104 N.W. 1089	45
<i>Walker v. Boston Hope Ins. Co.</i> , 80 Mass. 288	27
<i>Wheeldon v. United States</i> , 184 F. Supp. 81	21
<i>White v. Crisp</i> , 10 Ex. D. 312, 156 Eng. Rep. 463	
(1854)	22
<i>Willamette Iron Bridge Co. v. Hatch</i> , 125 U.S. 1	42, 43, 44, 49
<i>Winpenny & Chedester v. Philadelphia</i> , 65 Pa. 135	24, 25
Constitution, Statutes and Regulation:	
Constitution of the United States:	
Article 1, Section 8	47
Disaster Relief Act, 42 U.S.C. 1855, <i>et seq.</i>	4, 50
Limitation of Vessel Owner's Liability Act of 1851,	
9 Stat. 635, as amended, 46 U.S.C. 181-189	9, 26, 28
46 U.S.C. 183	57
46 U.S.C. 183(a)	57
46 U.S.C. 186	28, 58
Rivers and Harbors Act of June 14, 1880, 21 Stat. 180,	
Section 4	30, 31, 32
Rivers and Harbors Act of 1882, 22 Stat. 191	32
Rivers and Harbors Act of 1890, 26 Stat. 426:	
Section 8	32
Section 10	12, 13

Constitution, Statutes and Regulation—Continued

Rivers and Harbors Act of March 3, 1899, 30 Stat. 1151, <i>et seq.</i> , as amended, 33 U.S.C. 401, <i>et seq.</i> :	Page
Section 10, 33 U.S.C. 403-----	7,
8, 10, 11, 12, 13, 15, 16, 17, 18, 20, 51	
Section 12, 33 U.S.C. 406-----	13, 51
Section 15, 33 U.S.C. 409-----	7,
8, 10, 11, 12, 13, 15, 18, 19, 20, 27, 28, 33, 34, 35, 52	
Section 16, 33 U.S.C. 411-----	15, 53
Section 16, 33 U.S.C. 412-----	18, 53
Section 17, 33 U.S.C. 413-----	54
Section 19, 33 U.S.C. 414-----	12, 15, 29, 55
Section 20, 33 U.S.C. 415-----	12, 15, 29, 56
31 U.S.C. 725a(b)(14)-----	35
33 U.S.C. 10-----	44
Louisiana Direct Action Statute, 15A La. Rev. Stat. 22:655-----	6
Harbours, Docks, and Piers Clauses Act, 1847, 32 & 33 Vict. ch. c, § 96-----	40
33 C.F.R. § 209.410 (11 Fed. Reg. 177, A-828)-----	38, 58
Miscellaneous:	
Comment, <i>Substantive and Remedial Problems in Preventing Interferences with Navigation: The Republic Steel Case</i> , 59 Colum. L. Rev. 1065 (1959)-----	14, 44
10 Cong. Rec., Pt. 4, 3437 (1880)-----	31
21 Cong. Rec., Pt. 9, 8604-8605-----	43
32 Cong. Rec., Pt. 3, 2296, 2297 (1899)-----	13, 14
32 Cong. Rec., Pt. 3, 2923 (1899)-----	13, 33
Department of Army Pamphlet, 27-164, "Military Reservations and Navigable Waters" (July 1961), pp. 181-182-----	38
Desty, <i>A Manual of the Law Relating to Shipping and Admiralty</i> § 392 (1879)-----	12, 42
Gilmore & Black, <i>Law of Admiralty</i> (1957)-----	27, 28
H. Doc. No. 293, 54th Cong., 2d Sess. (1897)-----	13, 40
H. Rep. No. 1633, 88th Cong., 2d Sess. (1964)-----	37
Hughes, <i>Handbook of Admiralty Law</i> § 142 (2d ed. 1920)-----	22
Marsden, <i>Collisions at Sea</i> , 172-73 (London, 10th ed.)-----	27
Note, 41 Tul. L. Rev. 459 (1967)-----	18
Prosser, <i>Torts</i> , pp. 401-2 (2d ed. 1955)-----	44
Ray, <i>The Removal of Obstructions from Navigable Waters—Who Pays?</i> , 34 Ins. Couns. J. 28 (1967)---	24

Miscellaneous—Continued

	Page
<i>Restatement of Restitution</i> , § 115 (1937 ed.)-----	46
3 Sedgewick, <i>Damages</i> , p. 1958 (9th ed.)-----	45
4 Shearmen & Redfield, <i>Negligence</i> , p. 1866 (rev. ed. 1941)-----	45
2 Story, <i>Equity Jurisprudence</i> § 1248 (14th ed. 1918)---	45
Wisdom, <i>Obstructions in Rivers</i> , 119 Just. P. 846 (1955)-	12, 41



In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 31

WYANDOTTE TRANSPORTATION CO., ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 150) is reported *sub nom. United States of America v. Cargill, Inc., et al.*, at 367 F. 2d 97. The opinion on petition for rehearing *en banc* (R. 172) is reported at 367 F. 2d 979. The opinion of the district court (R. 146) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1966 (R. 166), and a petition for rehearing *en banc* (R. 167) was denied on September 12, 1966 (R. 172). The petition for a writ of certiorari was filed on December 7, 1966, and granted on Feb-

(1)

ruary 13, 1967 (R. 174; 386 U.S. 906). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES AND REGULATION INVOLVED

The statutes and regulation involved are set forth in the appendix to this brief, pp. 53-60 *infra*.

QUESTION PRESENTED

Whether one who negligently causes a vessel to sink and obstruct navigation in an inland waterway may, by abandoning it, avoid personal responsibility for the removal of the vessel or the cost of removal.

STATEMENT

This case involves two separate actions, consolidated by the district court (R. 145), both arising out of the negligent sinking of vessels in the Mississippi River. The United States commenced these libels to establish petitioners' responsibility either to remove the sunken vessels or to reimburse the government for the net cost of their removal.

1. *The WYCHEM action*.¹ On March 23, 1961, the barge WYCHEM 112, loaded with 2,220,000 pounds of liquid chlorine sank in the Mississippi River near Vidalia, Louisiana (R. 22-23). The chlorine was stored on the WYCHEM in four chemical tanks, each 75 feet long and 11½ feet in diameter (R. 22), and containing some 275 tons of chlorine (R. 26).² The

¹ *United States of America v. 2,220,000 Pounds Chlorine Cargo ex Barge WYCHEM 112 and Containers, in rem; and Union Carbide Corp., Wyandotte Transportation Co., and Union Barge Line Corp., in personam* (E.D. La., Adm. No. 668) (R. 1).

² As noted in the libel (R. 26), this is more chlorine than the

chlorine in these tanks was under pressure and if any escaped it would be in the form of deadly chlorine gas (R. 24, 73). Estimates were made that escape of the gas might cause 40,000 to 50,000 casualties, with 10,000 to 25,000 fatalities (R. 25). Even a single small leak in the valves of the storage tanks could result in the release of all of the chlorine gas (R. 24).

The owner and operators of the WYCHEM, and their underwriters, made some efforts to locate and raise the barge and its deadly cargo (R. 24). However, in November, 1961, the owner of the WYCHEM—petitioner Wyandotte Transportation Company, a wholly owned subsidiary of the Wyandotte Chemicals Corporation³—notified the Corps of Engineers that further efforts to locate and salvage the wreck would be unsuccessful; that it would assume no further responsibility for the barge or its cargo; and that it was abandoning the vessel (R. 40-41).⁴

Germans used in their first chlorine gas attack in 1915 at Ypres which caused 5,000 deaths.

³ An affidavit (R. 33-35) filed in the district court by the Wyandotte Transportation Co. alleged that while it had been owner of the WYCHEM, the barge was being operated by its parent corporation, Wyandotte Chemicals Corp., under a bare-boat charter at the time of the sinking. The government thereafter moved to amend its libel to add Wyandotte Chemicals Corp. as an additional party (R. 144). The district court's dismissal of the action made it unnecessary for it to rule on this motion, and therefore neither the district court nor the court of appeals acted upon it. Presumably the district court will decide the motion upon remand, if the judgment of the Fifth Circuit reinstating the libel is affirmed.

⁴ The court of appeals, noting that the record indicated a possible conflict of evidence on the question of the government's acceptance of abandonment, expressly refrained from

The Wyandotte Chemicals Corporation rejected a demand by the government that the wreck be removed (R. 25).

After the grave danger presented by the sunken vessel was fully appraised by government agencies, including the Public Health Service and the Office of Emergency Planning (R. 25), the President of the United States, on October 10, 1962, proclaimed a major disaster under the Disaster Relief Act⁵ (R. 25). The United States then undertook to abate the emergency and avert a catastrophe by locating the WYCHEM, and raising and removing over a thousand tons of chlorine. These efforts were successful. In the course of the operation, the government incurred expenses of approximately \$3,081,000 (R. 28).⁶

When the owners and operators of the WYCHEM refused to reimburse the United States for these expenses, the government instituted a libel *in rem* against the salvaged chlorine cargo (R. 20) and *in personam* against the owner of the WYCHEM (petitioner Wyandotte Transportation Co.), the owner of

resolving the issue since the question of abandonment *vel non* was not necessary to the decision of the court (R. 153). The district court had concluded as a matter of law that the government accepted the abandonment by attaching, seizing, and selling the wreck when it was raised from the river (R. 146-147).

⁵ 42 U.S.C. 1855-1855g. The Governor of Mississippi also proclaimed a major disaster (R. 25).

⁶ \$1,565,000 was for engineering expenses while the remaining \$1,516,000 was for public health and safety expenses, including necessary precautions against a possible rupture in the tanks during salvage operations (R. 28). For a description of the salvage operations, see Fales, "Time Bombs in the Mississippi," Popular Sci. Monthly, April, 1963 (R. 72-85).

the tow boat that had been pushing the WYCHEM when it sank (petitioner Union Barge Line Corp.), and the owner of the chlorine cargo (Union Carbide Corp.) (R. 20-22).

The libel alleged that the sinking of the WYCHEM was caused solely by the "fault and neglect" of Wyandotte, Union Barge, and Union Carbide (R. 26). Enumerated in the libel were some sixteen separate acts of negligence (R. 26-28), including inadequate manning, a failure to fasten a hatch cover on the barge, improper design of the barge, lack of essential equipment, dangerous towage procedures, and general unseaworthiness. The relief requested was a decree for the damages suffered by the government in removing the wreck (R. 28-29).

Upon motion of the government, the district court ordered the sale of the chlorine cargo and containers, seized by the marshal at the commencement of the suit (R. 29-30), and directed the payment of the \$85,000 in proceeds into the registry of the court, pending final disposition of the litigation (R. 31). Thereafter, motions to dismiss the libel made by each of the parties sued *in personam* (R. 32, 44, 46) were consolidated for decision with similar motions in the second of the two actions (R. 145).

2. *The Cargill action.*¹ The libel in this action alleged the following (R. 12-18): At the end of March 1961, the barges M 65 and L 1 were moored by a tug,

¹ *United States of America v. Cargill, Inc., Cargo Carriers Inc., Inland Rivers Transp. Co., Jeffersonville Boat and Machine Co., Continental Ins. Co., Travelers Ins. Co.* (E.D. La., Adm. No. 667) (R. 1).

time chartered to petitioner Cargo Carriers, Inc., at the Cargill, Inc. fleet mooring, mile 227.5 above Head of Passes, Baton Rouge, Louisiana (R. 14). At approximately 3:32 A.M. on March 31, 1961, near mile 224 above Head of Passes, the super tanker ESSO ZURICH collided with and sank an unmanned and unlighted barge that had been drifting in the channel (R. 14). The bow lookout on the ESSO ZURICH had seen two unlighted barges, only one of which was hit (R. 14). At 1:24 P.M. later that day, petitioner Cargo Carriers notified the Corps of Engineers that barges L 1 and M 65 had been sunk that day (R. 14), and subsequently the Corps of Engineers was notified that both barges were being abandoned (R. 15). The United States refused to accept abandonment or assume responsibility for removing the wrecks (R. 15).

The United States then brought suit against the owners, managers, charterers, and insurers^{*} of the two barges, alleging that negligence in the condition and mooring of the barges had caused their sinking in the navigable waterway (R. 17). In its prayer for relief, the United States sought a decree that the respondents named in the libel had the responsibility and liability for marking and removing the wrecks (R. 17-18).

^{*}Suit against the insurers was brought pursuant to the Louisiana Direct Action Statute, 15A La. Rev. Stat. 22:655 (R. 17). Respondent Continental Insurance Co. covered these barges under a standard type Inland Protection and Indemnity form which included coverage for "any attempted or actual raising, removal or destruction of the wreck of the insured vessel or the cargo thereof, or any neglect or failure to raise, remove or destroy the same" (R. 16-17).

3. *The decisions below.* The district court entered summary judgment against the government in each action on the ground that "the only right * * * that the United States Government has to recover its expenses is a right in rem against the vessels themselves" (R. 147). The Court of Appeals for the Fifth Circuit reversed and remanded, holding that under the Rivers and Harbors Act of 1899 (30 Stat. 1151, 33 U.S.C. 401, *et seq.*) those persons responsible for the negligent sinking of a vessel in navigable waters are liable *in personam* for the removal or the cost of removal of the vessel. The court noted that Section 10 of the Act (33 U.S.C. 403) prohibits "the creation of any obstruction" to navigation and that Section 15 (33 U.S.C. 409) specifically makes it unlawful "to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels." Relying, *inter alia*, on *United States v. Republic Steel Corp.*, 362 U.S. 482, the court held that the statutory prohibition in Section 10 implicitly recognizes the availability of the remedies of injunction or monetary damages, imposing on the tort-feasors the burden of removing vessels sunk as the result of their negligence. The court remanded the case to the district court for trial on the issue of negligence. Petitioners' applications for rehearing *en banc* were denied (R. 172).⁹

⁹ On petition for rehearing filed by the consignee-owner of the chlorine cargo, Union Carbide Corp., the court of appeals affirmed the summary judgment entered in its favor, on the ground that "there are no allegations or proof of negligence" on its part (R. 172). That determination is not before this Court for review.

SUMMARY OF ARGUMENT

I

The Rivers and Harbors Act of 1899 prohibits the negligent sinking of vessels in navigable waterways. Two separate sections of the Act embody this prohibition. Section 10 makes unlawful the creation in navigable waters of "any obstruction" not authorized by Congress. Section 15 makes it unlawful to "carelessly sink, or permit or cause to be sunk," a vessel in navigable waters. Under well settled principles of law, recently applied by this Court in *United States v. Republic Steel Corp.*, 362 U.S. 482, these prohibitions can be enforced by resort to appropriate judicial remedies, even if the statute itself does not precisely define them. Accordingly, the court below correctly held Section 10 conferred upon the government the right to obtain a mandatory injunction to compel those responsible for the negligent sinking of vessels to remove them and, where the vessels have been removed by the government, the right to recover *in personam* the cost of removal from those who caused the obstruction.

The rationale of the court's holding that Section 10 creates *in personam* liability applies with at least equal force to Section 15. The declaration in Section 15 that it is unlawful to cause a vessel to sink in a navigable waterway necessarily presupposes the existence of effective judicial remedies. Thus Section 15 provides an alternative basis for affirmance.

The liability imposed by the Act cannot be defeated by the expedient of abandoning the sunken vessel. Under the general maritime law and the Limitation of Vessel Owner's Liability Act of 1851, a person who negligently sinks a vessel remains personally liable for the consequences of his fault even though he abandons his vessel. Nothing in the Rivers and Harbors Act of 1899 alters this policy. Therefore, the mere fact that the negligently sunken vessel has been abandoned by those responsible for the sinking does not relieve such persons of liability under the Rivers and Harbors Act for removing the vessel or paying the cost of removal.

II

The Rivers and Harbors Act of 1899 was passed as a compilation of legislation affecting the navigable waterways. It did not, and was not intended to, displace completely the corpus of non-statutory law in this area. Under non-statutory law, a vessel negligently sunken in navigable waters constitutes a public nuisance which must be abated by those who created the nuisance, or they are liable for the expenses of one who lawfully abates the nuisance. Because of its regulatory and proprietary interests in the Mississippi River, the United States is entitled to invoke the non-statutory law to compel those who created a nuisance by negligently sinking their vessels to abate the nuisance, or to abate the nuisance itself and compel those responsible for it to reimburse the government for expenses reasonably incurred.

ARGUMENT

- I. THE RIVERS AND HARBORS ACT OF 1899 PROHIBITS THE NEGLIGENT SINKING OF A VESSEL IN A NAVIGABLE RIVER AND REQUIRES THOSE RESPONSIBLE TO REMOVE THE VESSEL OR PAY THE COST OF REMOVAL

The Rivers and Harbors Act of 1899¹⁰ was part of a "great design" to facilitate the unimpeded flow of commerce over the waterways of the Nation by assuring the existence of navigable channels free of obstructions. *United States v. Republic Steel Co.*, 362 U.S. 482, 492. It is clearly inconsistent with this legislative plan to permit those who own, operate, or use vessels on our public rivers to avoid personal responsibility for the consequences of unlawfully obstructing the navigable waters by negligently sinking their vessels. Sensitive to this reality, the court below—and dissenting judges in other recent cases presenting the same question—correctly construed the Act as imposing on persons who negligently sink vessels the liability for removing them or for paying the cost of their removal.

The court below found that Section 40 of the Act (33 U.S.C. 403) creates such liability because a sunken vessel is an unlawful "obstruction" within the meaning of that section. In *United States v. Bethlehem Steel Co. (The Texmar)*, 319 F. 2d 512 (C.A. 9), certiorari denied, 375 U.S. 966, Judge Browning in dissent wrote that Section 15 of the Act (33 U.S.C. 409) creates personal liability in this type of case by

¹⁰ 30 Stat. 1151, as amended, 33 U.S.C. 401-418. The relevant portions of that Act are printed at pp. 53-59 *infra*.

expressly making unlawful the careless sinking of a vessel. And Judge Sobeloff, dissenting in *United States v. Bethlehem Steel Co.*, 374 F. 2d 656, 669 (C.A. 4), certiorari pending, No. 130, October Term, 1967, noted that the reasoning of the Fifth Circuit in the case at bar and that of Judge Browning in *The Texmar* are consistent with each other, although each premised *in personam* liability on a different section of the Act, and recognized that each construction was in harmony with the clear language and fundamental purpose of the Act.

We submit that *in personam* liability for the negligent sinking of a vessel may be founded upon either Section 10 of the Act or Section 15, or both. We therefore set forth our arguments in the alternative, either of which we believe fully supports the imposition of personal liability by the court below.

A. PETITIONERS ARE PERSONALLY LIABLE UNDER SECTION 10 OF THE ACT FOR THE NEGLIGENT SINKING

1. A threshold question is whether a vessel negligently sunk in a river constitutes an "obstruction" forbidden by Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, p. 53, *infra*. That section provides in pertinent part:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; * * *.

The plain language of this section is broad enough to include within its prohibition the negligent sinking of a vessel in navigable waters. Moreover, the term "obstruction" as used in Section 10, consistently with

historical usage," has been construed liberally so that it is clear that the term encompasses sunken vessels. As stated in *United States v. Republic Steel*, *supra*, 362 U.S. at 487-488, an obstruction is "anything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States * * *" (quoting from *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690, 708). See, also, *Sanitary District v. United States*, 266 U.S. 405.

The provision of Section 10 of the 1899 Act prohibiting obstructions was based on a similar provision in the Rivers and Harbors Act of 1890, 26 Stat. 426, 454-455.¹² Under the prior Act, a sunken vessel, deliberately scuttled by its owners, had been held to be an "obstruction" which the government by injunction could compel the owners to remove. *United States v. Hall*, 63 Fed. 472 (C.A. 1). In enacting the 1899 Act, Congress expressly stated it intended to codify rather than change existing law. There was no hint that Congress did not share the understanding of the First Circuit in *Hall* that the term "obstruc-

¹¹ "A river may become obstructed in a variety of ways, *i.e.*, by * * * (5) vessels sunk or inconveniently moored * * *" Wisdom, *Obstructions in Rivers*, 119 Just. P. 846 (1955); see Desty, *A Manual of the Law Relating to Shipping and Admiralty* § 392 (1879); *Tyne Improvement Comm'rs v. Armement Anversois S/A*, [1949] A.C. 326, [1949] 1 All E.R. 294 (H.L.).

The phrasing of Sections 15, 19, and 20 of the Rivers and Harbors Act of 1899, 33 U.S.C. 409, 414, 415, testifies to the understanding of the Congress that enacted Section 10 that sunken vessels are "obstructions."

¹² Section 10 of the 1890 Act prohibited "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters * * *."

tion" includes sunken vessels.¹³ Thus the text of Section 10, the construction of that section by this Court, the historical understanding of the term, and the legislative history, all support the holding of the court below that in negligently causing the sinking of the barge WYCHEM, containing the 2,220,000 pounds of chlorine, and the barges M 65 and L 1, petitioners created an "obstruction" prohibited by Section 10.

2. A violation of the Section 10 prohibition is made a crime by Section 12 (33 U.S.C. 406) of the Rivers and Harbors Act.¹⁴ The question here is whether the absence of a comparable provision explicitly granting a civil remedy for injuries caused by a violation of the prohibition precludes enforcement of the Act except by criminal prosecution.^{14a} We submit the silence of the statute does not bar civil relief.

¹³ The House conferees stated the Act was intended as a "codification of existing laws pertaining to rivers and harbors, though containing no essential changes in the existing law." 32 Cong. Rec. Pt. 3, 2923 (1899). See 32 Cong. Rec., Pt. 3, 2296, 2297 (1899). In *Republic Steel, supra*, this Court noted that the Act made "no essential changes in existing law." 362 U.S. at 486.

¹⁴ "Every person and every corporation that shall violate any of the provisions of sections * * * 403 [§ 10] * * * of this title * * * shall be deemed guilty of a misdemeanor."

^{14a} Section 12 of the Act, 33 U.S.C. 406, does provide for civil injunctive relief but only with respect to unlawful "structures". See *United States v. Republic Steel, supra*, 362 U.S. at 491. We proceed on the premise that there is no extant statutory authorization for enjoining the continuation of a prohibited "obstructions"—although that is not wholly clear. Indeed, Section 10 of the Rivers and Harbors Act of 1890, 26 Stat. 454 (the immediate source for the same numbered section in the 1899 Act under consideration), after defining a criminal offense and the penalty, went on expressly to provide that "the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the in-

There is a well settled rule that disregard of the command of a penal statute is a wrongful act for which the courts will imply a right to recover damages from the offending party. *E.g., Texas & Pac. R. v. Rigsby*, 241 U.S. 33, 39-40; *J. I. Case Co. v. Borak*, 377 U.S. 426, 433; *North Bloomfield Gravel Mining Co. v. United States*, 88 Fed. 664, 678-679 (C.A. 9); *Reitmeister v. Reitmeister*, 162 F. 2d 691, 694 (C.A. 2); *Dann v. Studebaker-Packard Corp.*, 288 F. 2d 201, 208-209 (C.A. 6). It was this general principle that this Court relied on in *United States v. Republic Steel*, *supra*. In that case, the government sued to enjoin three manufacturers from dumping industrial wastes into a navigable river and to compel them to remove existing

junction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States." 26 Stat. 455. This explicit authorization was never specifically repealed. The repealer in the 1899 Act extended only to "all laws or parts of laws inconsistent with" the provisions of the Act. The Rivers and Harbors Act of 1899 was intended to be an integrated compilation of existing law, and was not designed to reduce the substantive protections of the navigable waterways. To the objection that the bill would revise existing law, the Senate floor manager replied: "Oh, no. There are not ten words changed in the entire thirteen sections. It is a compilation." 32 Cong. Rec. 2297 (1899). See, also, H. Doc. No. 293, 54th Cong., 2d Sess. (1897). Because the two Acts were presumed to be harmonious, for many years after the passage of the 1899 Act, courts—including this Court—continued to cite as of continuing force various sections of the 1890 Act, among them Section 10. See Comment, *Substantive and Remedial Problems in Preventing Interferences with Navigation: the Republic Steel Case*, 59 Colum. L. Rev. 1065, 1067-1068, n. 21 (1959) and cases cited; *United States v. Wishkah Boom Co.*, 136 Fed. 42 (C.A. 9), appeal dismissed, 202 U.S. 613. Contra, *United States v. Wilson*, 235 F. 2d 251 (C.A. 2).

deposits. Having concluded that the defendants were creating an "obstruction" prohibited by Section 10 of the Rivers and Harbors Act, the Court held that an action for civil injunctive relief would lie, notwithstanding the fact that the Act expressly provided only for criminal sanctions. This Court stated (362 U.S. at 492) :

* * * the Attorney General could bring suit, even though Congress had not given specific authority. The test was whether the United States had an interest to protect or defend. Section 10 of the present Act defines the interest of the United States which the injunction serves. * * * Congress has legislated and made its purpose clear; it has provided enough federal law in § 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation.

See, also, *Sanitary District v. United States*, 266 U.S. 405; *United States v. San Jacinto Tin Co.*, 125 U.S. 273; *North Bloomfield Gravel Mining Co. v. United States*, 88 Fed. 664 (C.A. 9).

• *Republic Steel* directly sustains the holding of the court below that an injunction will lie against the operators of the barges M 65 and L 1 to compel them to remove these obstructions. We believe it also supports the ruling that the government may recover from those responsible for the sinking of the barge WYCHEM the cost of removing the 2,220,000 pounds of chlorine constituting an obstruction, for the imposition of removal costs is equally one of the "appropriate remedies [which] may be fashioned" from Sec-

tion 10. That is the view of at least two of the other circuits where the question has arisen. *United States v. Perma Paving Co.*, 332 F. 2d 754 (C.A. 2); *United States v. New York Central R. Co.*, 252 F. Supp. 508 (D. Mass.), affirmed *per curiam*, 358 F. 2d 747 (C.A. 1). See, also, *Restatement of Restitution*, § 115 (1937). But see, *United States v. Zubik*, 295 F. 2d 53 (C.A. 3). As the Court of Appeals for the Second Circuit observed in *Perma Paving*, rejecting the contention that the Act only permitted injunctive relief and not recovery of removal costs (332 F. 2d at 758):

We can think of no sensible reason why Congress should have desired that if the executive branch chooses to effect immediate removal of an obstruction, through the services of the Corps of Engineers or otherwise, rather than resort to the slower injunctive process of the courts, the offender should thereby escape his due.

3. The immediacy of the crisis created by the sinking of the WYCHEM is ample demonstration that the United States should not be considered remediless because it proceeds with dispatch in an emergency, instead of asserting its right to injunctive relief. A decree for reasonable costs is clearly the complementary remedy. Petitioners contend, however, that Section 10 is inapplicable to negligently sunken vessels. Pet. Br. pp. 26-27. Pointing to the fact that subsequent sections of the Act¹⁵ expressly refer to sunken vessels, they urge that these sections are the only ones applicable and that any liability must be derived from them. And they rely on the Fourth Circuit's decision in *United States v.*

¹⁵ Sections 15, 16, 19, 20, 33 U.S.C. 409, 411, 412, 414, 415.

Bethlehem Steel Co., 374 F. 2d 656, petition for certiorari pending, No. 130, October Term 1967, in which a divided court so held. We submit the approach taken by the Fourth Circuit in rigidly compartmentalizing the Act and confining the scope of the section will not withstand close scrutiny.

Judge Sobeloff's incisive analysis in dissent in *Bethlehem Steel* persuasively demonstrates that the scheme of the Act as a whole discloses no congressional intention to exclude sunken vessels from the class of obstructions proscribed by Section 10.¹⁶ The mere fact that certain sections of the Act expressly treat the problem of sunken vessels does not require that result. A careful comparison of Section 10 with the portions of the sections dealing expressly with sunken vessels discloses that the other provi-

¹⁶ The lower federal courts have split on the issue of whether the Section 10 prohibition is applicable to negligently sunken vessels. In addition to the Fifth Circuit's decision in the case at bar, decisions of other courts expressly or by implication supporting the position that Section 10 is applicable are *United States v. Wilson*, 235 F. 2d 251 (C.A. 2); *United States v. Zubik*, 295 F. 2d 53 (C.A. 3); *United States v. Bethlehem Steel Co. (The Texmar)*, 319 F. 2d 512, 522, fn. 1 (C.A. 9) (dissenting opinion of Judge Browning). See also *United States v. Hall*, 63 Fed. 472 (C.A. 1); *United States v. New York Central R. Co.*, 252 F. Supp. 508 (D. Mass.), affirmed *per curiam*, 358 F. 2d 747 (C.A. 1). Decisions, expressly or by implication, supporting the position that Section 10 is inapplicable are *United States v. Bridgeport Towing Line, Inc.*, 15 F. 2d 240 (D. Conn.); *In re Eastern Transportation Co.*, 102 F. Supp. 913 (D. Md.), affirmed on other grounds *sub nom. Ottenheimer v. Whitaker*, 198 F. 2d 289 (C.A. 4); *The Manhattan*, 10 F. Supp. 45 (E.D. Pa.), affirmed, 85 F. 2d 427 (C.A. 3), certiorari denied *sub nom. United States v. The Bessemer*, 300 U.S. 654; *Loud v. United States*, 286 F. 2d 56 (C.A. 6); *United States v. Bethlehem Steel Co. (The Texmar)*, 319 F. 2d 512 (C.A. 9).

sions were intended to "supplement" the general language of Section 10, rather than operate independently of it. The provisions specifically dealing with sunken vessels are but an "emphatic restatement" of the prohibition set forth in Section 10. To exclude negligently sunken vessels from the coverage of Section 10—which bans "any" obstruction—would be to give that provision "a narrow, cramped reading," at odds with the broad purpose of the Act. See *United States v. Republic Steel Corp.*, *supra*, 362 U.S. at 491; *United States v. Standard Oil Co.*, 384 U.S. 224, 226.¹⁷

In sum, we submit that Judge Sobeloff's dissent in *Bethlehem Steel* persuasively reinforces the correctness of the decision by the Fifth Circuit below, holding Section 10 applicable to negligently sunken vessels. This construction is the only one that is in accord with the clearly expressed policy of the Act to keep waterways free of obstructions, and it echoes the spirit of the decisions of this Court vindicating that policy.

¹⁷ There is certainly no warrant for distinguishing between intentionally and negligently sunken vessels—as the majority in *Bethlehem Steel* was apparently willing to do. Judge Sobeloff, dissenting in that case, was plainly correct in saying that the definition of "obstruction" used in Section 10 "cannot reasonably be thought to turn on whether a person acts deliberately or carelessly." 374 F. 2d at 671. As the Fifth Circuit observed here, defining an obstruction in terms of how it arose is inconsistent with the plain language of the section proscribing "any" obstruction.

B. PETITIONERS ARE PERSONALLY LIABLE UNDER SECTION 15 OF THE
ACT FOR THE NEGLIGENT SINKING

Even if Section 10 reasonably could be construed as inapplicable to negligently sunken vessels, petitioners would still be liable *in personam* under Section 15 of the Act (33 U.S.C. 409), which deals expressly with sunken vessels.¹⁸ Like Section 10, Section 15 sets forth an explicit prohibition which is designed to assure that navigable waters remain free of obstruction. In relevant part, it provides:

It shall not be lawful to * * * voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels * * *.

As we view it, this prohibition against the careless or negligent sinking of a vessel is an "emphatic restatement," particularizing the Section 10 prohibition on "obstructions".

Petitioners do not dispute that the negligent sinking of their vessels violated the Section 15 prohibition. Nevertheless, they argue that they are exempt from *in personam* civil responsibility because the Act does not explicitly provide for it (Pet. Br. pp. 10-12). As with Section 10, there is no express statement of the civil consequences of negligently sinking a ship in violation of Section 15, but only a criminal sanction.¹⁹

¹⁸ See Note, 41 Tul. L. Rev. 459, 463-464 (1967), discussing the instant case.

¹⁹ Section 16 of the Act, 33 U.S.C. 411 provides: "Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections * * * 409 [Section 15] of this title shall be guilty of a misdemeanor * * *."

Petitioners therefore contend that a violation of Section 15 subjects them solely to the criminal sanctions.

As we have seen, this same line of reasoning is advanced by petitioners as a defense to liability under Section 10. It has no greater merit when applied to Section 15. It requires no extended discussion to explain that this Court's teaching in *Republic Steel* applies equally to effectuating Section 15. The legal principles already discussed with respect to Section 10 permit civil remedies to be fashioned out of Section 15 so as to avoid imputing to Congress "a futility inconsistent with the great design of this legislation." *Republic Steel, supra*, 362 U.S. at 492. It is a corollary of equity that an indictable interference with navigability is also subject to injunction. *Mayor et al. of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91, 97; *Attorney-General v. Terry*, L.R. 9 Ch. 423, 432 (Ch. App. 1874); *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 150, 4 Pac. 1152. Accordingly, it follows that there is liability under Section 15 for the removal of negligently sunken vessels or the cost of their removal. As stated by Judge Browning in his dissent in *The Texmar, supra*, 319 F. 2d at 523:

[Section 15], like [Section 10], reflects the interest of the United States in the unobstructed navigability of its waters. *Republic Steel* holds that to protect this interest an injunctive remedy must be implied against those who create an unauthorized obstruction in violation of [Section 10]; therefore a like remedy is to be implied against those who voluntarily or carelessly sink vessels in navigable channels in violation of [Section 15]. Since the United States may by mandatory injunction impose the

burden of removal upon one who sinks a ship in violation of [Section 15], the government should not be denied restitution if it is compelled to assume the costs of removal by the refusal of the wrongdoer to discharge his duty. * * *

See *Bethlehem Steel*, *supra*, (dissenting opinion).²⁰

C. PETITIONERS CANNOT AVOID PERSONAL LIABILITY FOR THEIR NEGLIGENCE BY ABANDONING THE WRECK

Despite the fact that petitioners have violated the explicit prohibitions contained in Sections 10 and 15 of the Rivers and Harbors Act, they argue that they may immunize themselves from the *in personam* consequences of their unlawful negligence by the simple expedient of abandoning their vessels. This argument is based upon their contention (Pet. Br. pp. 17-21) that under the general maritime law an owner has a right to abandon his negligently sunken vessel and

²⁰In addition to the *Bethlehem* and *The Texmar* cases and the case at bar, the issue of whether a civil remedy could be implied from the prohibition of Section 15 has been expressly considered in *The Manhattan*, 10 F. Supp. 45 (E.D. Pa.), affirmed, 85 F. 2d 427 (C.A. 3), certiorari denied *sub nom. United States v. The Bessemer*, 300 U.S. 654; *United States v. Wilson*, 235 F. 2d 251 (C.A. 2); and *United States v. Zubik*, 295 F. 2d 53 (C.A. 3).

The Manhattan and *Wilson* were decided prior to *Republic Steel*, and the courts found no civil sanctions under Section 15. The authority of the *Wilson* decision has also been undermined by the Second Circuit's subsequent decision in *United States v. Perma Paving Co.*, 332 F. 2d 754, discussed *supra*, p. 16. In *Zubik* the court declined to make an analogy between Section 15 and this Court's holding in *Republic Steel* on the implementation of Section 10, and found no civil liability under Section 15. Compare *In re Eastern Transportation Co.*, 102 F. Supp. 913 (D. Md.), affirmed *sub nom. Ottenheimer v. Whitaker*, 198 F. 2d 289 (C.A. 4), holding that Section 15 permits abandonment of a vessel without liability only when the wreck occurs without fault.

thereby avoid personal liability. This right, it is further contended, not only was not altered by the Rivers and Harbors Act, but was expressly preserved by the Act (Pet. Br. p. 18).

At the outset, it is important to note that even if this argument rested on a solid foundation, it could not be relied on by those petitioners who were not the owners of the sunken vessels. Neither Section 10 nor Section 15 limits its ban on negligently causing obstructions or causing vessels to sink to the owners of the vessels involved. Anyone responsible for the result has engaged in unlawful conduct and is presumptively liable for removing the wreck or paying the costs of removal. But, as we now show, the general maritime law has never conferred a right even upon the owner of a negligently sunken vessel to escape personal liability by abandoning the vessel; the Limitation of Vessel Owner's Liability Act of 1851 precludes the avoidance of personal liability by negligent parties; and the Rivers and Harbors Act accords with that tradition by not exempting from personal liability persons who negligently sink vessels.

1. The general maritime law, as interpreted and applied by the American and English courts, establishes the right of an owner of a vessel which has been sunk *without fault on his part* to avoid *in personam* liability by abandoning his vessel. See *The City of Newark v. Mills*, 35 F. 2d 110 (C.A. 3), certiorari denied, 281 U.S. 722; *In re Highland Corp.*, 24 F. 2d 582 (S.D.N.Y.), affirmed, 29 F. 2d 37 (C.A. 2); *Wheeldon v. United States*, 184 F. Supp. 81 (N.D. Calif.); *Orrell v. Wilmington Iron Works*, 89 F. Supp. 418

(E.D.N.C.) reversed in part on other grounds and affirmed in part, 185 F. 2d 181 (C.A. 4); *In the Matter of the Petition of Boat Demand, Inc.*, 174 F. Supp 668 (D. Mass.); *Ball v. Berwind*, 29 Fed. 541 (E.D.N.Y.); *The Swan*, 23 Fed. Cas. 495 (No. 13667) (C.C. S.D.N.Y.); *Taylor v. Atlantic Mutual Ins. Co.*, 37 N.Y. 275; *The Ella*, [1915] P. 111; *The Crystal*, [1894] A.C. 508, [1891-1894] All E.R. 804 (H.L. 1894); *White v. Crisp*, 10 Ex. D. 312, 156 Eng. Rep. 463 (1854); *Brown v. Mallett*, 5 C.B. 599, 136 Eng. Rep. 1013 (Common Pleas 1848); *Hancock v. York, Newcastle & Berwick Ry.*, 10 C.B. 348 (1850). The courts have established this principle on the theory that the owner whose ship is sunk through no fault of his own has suffered enough injury by the loss of his vessel.²¹ See *Gulf Coast Transp. Co. v. Ruddock-Orleans Cypress Co.*, 17 F. 2d 858 (E.D. La.); *Orrell v. Wilmington Iron Works*, *supra*, 89 F. Supp. at p. 424; *Hancock v. York, Newcastle & Berwick Ry.*, 10 C.B. 348 (1850). Such a benign policy, of course, does not apply where the sinking of a ship was due to the fault or negligence of the owner. Accordingly, where negligence is involved, as distinguished from unavoidable accident or natural calamity, the

²¹ See Hughes, *Handbook of Admiralty Law*, § 142 (2d ed. 1920). The continuing validity of this theory may be questioned in light of present shipping practices which permit a vessel owner to obtain insurance not only to cover the value of the loss of his vessel but also the cost of removing a sunken vessel. For example, as noted above, p. 6, fn. 8 *supra*, the sunken barges involved in the *Cargill* action were covered by petitioner Continental Insurance Co. under a standard type Inland Protection and Indemnity form which included coverage for liability for removal or failure to remove the wrecked insured vessels.

general maritime law did not recognize a right in the owner to absolve himself of *in personam* liability by abandonment. As stated by the English Court of Appeal in a case which involved recovery of the costs of removing a negligently sunken vessel:

At common law * * * the owners were liable for damage caused by their negligence—I say nothing at the moment about nuisance—and could not escape liability by saying they had abandoned the vessel. [*Dee Conservancy Board v. McConnell*, [1928] 2 K.B. 159, 163, [1928] All E.R. 554 (C.A.)] ²².

See *In the Matter of the Petition of Boat Demand, Inc.*, 174 F. Supp. 668 (D. Mass.); *In re Eastern Transp. Co.*, 102 F. Supp. 913 (D. Md.), affirmed *sub nom. Ottenheimer v. Whitaker*, 198 F. 2d 289 (C.A.

²² In *Dee*, the court held the conservators of a river and the owner of a wharf obstructed by an abandoned negligently sunken vessel could recover the costs of removal of the vessel *in personam* against the owner, based upon non-statutory liability, despite the existence of a statute purporting to govern liability for sunken vessels. The court found "the old common law liability remains where damage has been done by the negligence of the owner's servants." [1928] 2 K.B. at 164.

Petitioners, citing primarily English statutes which expressly impose *in personam* liability for the negligent sinking of vessels, contend that only by express statutory provision may such liability be created (Pet. Br. p. 35). This completely overlooks liability under non-statutory law which the *Dee* case demonstrates supplements the English statutory provisions, and which, as we show *infra* pp. 40-45, also supplements the ground for liability in this country under the Rivers and Harbors Act of 1899. The issue before this Court, therefore, is not merely whether it is proper to imply *in personam* liability under the Rivers and Harbors Act, but also whether the Act abolishes non-statutory liability. (Non-statutory liability is fully discussed in Part II of this brief.)

4); *Orrell v. Wilmington Iron Works*, *supra*, 89 F. Supp. at 421-423; *Boston & Hingham Steamboat Co. v. Munson*, 117 Mass. 34; *Taylor v. Atlantic Mutual Ins. Co.*, 37 N.Y. 275; *DeBardèlebem Coal Co. v. Cox*, 16 Ala. App. 172, 76 So. 409, certiorari denied, 76 Ala. 553, 76 So. 911; *Hancock v. York, Newcastle & Berwick Ry.*, 10 C.B. 348 (1856); *Brown v. Mallett*, 5 C.B. 599, 617, 136 Eng. Rep. 1013 (Common Pleas 1848). See also *The Scotland*, 105 U.S. 24, 28-29.

The majority opinions in the *Bethlehem Steel* case, *supra*, in the Fourth Circuit, and *The Texmar* case, *supra*, in the Ninth Circuit, erroneously presume that maritime law sanctioned unrestricted abandonment as a method of escaping *in personam* liability, even though the ship was sunk due to the owner's negligence.²³ Both opinions apparently base their presumptions on *Winpenny & Chedester v. Philadelphia*, 65 Pa. 135, and *The Manhattan*, 10 F. Supp. 45 (E.D. Pa.), affirmed, 85 F. 2d 427 (C.A. 3), certiorari denied *sub nom. United States v. The Bessemer*, 300 U.S. 654. In *Winpenny* the court dismissed a suit for dam-

²³ See also Ray, *The Removal of Obstructions from Navigable Waters—Who Pays?*, 34 Ins. Couns. J. 28 (1967).

Petitioners (Pet. Br. pp. 20-21) and *amici curiae* (Am. Cur. Br. pp. 10-12) argue strenuously about the economic significance of continuing to recognize liability in such cases, where highly volatile cargoes are a common-place components of present day water commerce. Apart from the availability of insurance, illustrated by the *Cargill* action, policy considerations militate against expanding the avenues for avoiding liability. "The dangers of modern machines make it all the more necessary that negligence be discouraged." *Bisso v. Inland Waterways Ass'n*, 349 U.S. 85, 91.

ages against the City of Philadelphia brought by the owner of a vessel that had struck an abandoned vessel lying submerged in the Philadelphia harbor. Under a local law, the city was obligated to keep the harbor free from obstructions. In finding no liability, the court held the local law inapplicable, due to the type of obstruction plaintiff's ship had hit. In *dicta*, the court speculated as to where the submerged vessel sank and how it was washed into the harbor, and in the course of its discussion asserted that the owner of a sunken vessel was not liable for its removal regardless of the cause of the vessel's sinking. Significantly, the British cases cited by the court hold only that a ship-owner who was *not at fault* in the sinking is not liable for the ship's removal.²⁴ The district court in *The Manhattan*,²⁵ without extended discussion and also in *dictum*, expressed its approval of the views narrated in *Winpenny*.

²⁴ For example, in *King v. Watts*, 2 Esp. 675, 676, 170 Eng. Rep. 493 (Assizes, 1798), the court held that an indictment brought by the City of London for a nuisance—a sunken vessel in the River Thames—could not be maintained since the sinking “had been occasioned, not by any default or willful misconduct of the defendant, but by accident and misfortune; and that it would be adding to the calamity to subject the party to an indictment, for what had proceeded from such causes, against which he could not guard, or which he could not prevent.” See also *Brown v. Mallett*, 5 C.B. 599, 136 Eng. Rep. 1013, 1021 (Common Pleas 1848) (the owner of a vessel sunk “without any fault of his” is not liable for its removal and therefore is not liable to a vessel that struck the wreck).

²⁵ *The Manhattan* involved removal of a vessel that sank through no fault of its own. See *The Manhattan*, 3 F. Supp. 75 (E.D. Pa.).

We submit that the *dicta* in these two cases do not accurately reflect the principles of maritime law and that they are contrary to the weight of considered authority explaining that only an owner who loses his vessel through no fault of his own may absolve himself of liability by abandoning his sunken vessel.²⁶

2. The maritime principle that the owner of a vessel is liable for his negligence was carried over into statutory law by the Limitation of Vessel Owner's Liability Act of 1851. In 1851, Congress enacted "An Act to Limit a Vessel Owner's Liability," 9 Stat. 635, which as amended now appears at 46 U.S.C. 181, *et seq.* (pp. 59-60 *infra*). That Act, as originally enacted and as it exists today, provides that the liability of the owner of any vessel "for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage or forfeiture" is limited "to the interest of such owner in such vessel, and her freight then pending," but only "if done, occasioned, or incurred *without the privity or knowledge of such owner*" (emphasis added).²⁷ The vessel owner's right to limit his liabil-

²⁶ Petitioners quote language of Judge Manton in *Petition of Highlands Navigation Corp.*, 29 F. 2d 37 (C.A. 2), in support of their contention that the general maritime law permits the avoidance of liability by the abandonment of a negligently sunken vessel (Pet. Br. p. 19). Reliance on this case is misplaced, however, as it involved a vessel which the court noted burned and sank without negligence. See also the opinion of the trial court. 24 F. 2d 582 (S.D.N.Y.).

²⁷ The Act was passed by Congress to promote the growth of the nation's shipping industry by encouraging investment in ships through the limitation of liability. Prior to the passage of this Act, the general maritime law as applied by American as well as English courts, in cases involving situations other than the abandonment of ships sunk without fault, recognized

ity for damage done by his vessel was thus made to depend upon his lack of "privity or knowledge" of the cause of the loss; *i.e.*, in the words of Chief Justice Hughes in *American Car & Foundry Co. v. Brassert*, 289 U.S. 261, 264, "[f]or his fault, neglect and contracts the owner remains liable."²⁸ Accordingly, in cases involving damages caused by a sunken vessel, the courts have permitted an owner to abandon his vessel and limit his liability to the value of the vessel and the freight due only where the circumstances demonstrate no such "fault" or "neglect" of the owner. See *The City of Newark v. Mills*, 35 F. 2d 110 (C.A. 3), certiorari denied, 281 U.S. 722; *The City of Bangor*, 13 F.

no general limitation of liability and thus the owner was held liable *in personam* for damages caused by negligence although the owner himself was without privity or knowledge of the negligence. See *The Scotland*, 105 U.S. 24, 28; *Stinson v. Wyman*, 23 Fed. Cas. 108, 109 (No. 13,460) (D. Me.); *Walker v. Boston Hope Ins. Co.*, 80 Mass. 288, 297; Marsden, *Collisions at Sea*, 172-173 (London, 10th ed.). See also *Norwich Co. v. Wright*, 13 Wall. 104.

²⁸ Under the "statutory duty" restriction on the availability of limitation of liability, an owner cannot avail himself of the protections of the Act to escape the consequences of his breach of a statutory duty. See Gilmore & Black, *The Law of Admiralty* § 10-13, at 679 (1957). In *The Snug Harbor*, 53 F. 2d 407, 410-411 (E.D.N.Y.), affirmed *sub nom. United States v. Eastern Transp. Co.*, 59 F. 2d 984 (C.A. 2), the court refused to permit the owner of a sunken vessel (the government) to limit its liability, because of its violation of Section 15 of the Rivers and Harbors Act of 1899. And the House of Lords not long ago decided that whether or not an owner may rely on the English equivalent of the Limitation Act to escape his common law liability for the cost of raising his negligently sunken ship, there is no question but that limitation is not permitted when the claim for costs is premised on the statutory liability for negligently creating an obstruction. See *The Stonedale No. 1*, [1955] 2 All E.R. 689, 693 (H.L.).

Supp. 648 (D. Mass); *In re Highland Corp.*, 24 F. 2d 582 (S.D.N.Y.), affirmed, 29 F. 2d 37 (C.A. 2); *Hagan v. City of Richmond*, 254 Va. 723, 52 S.E. 385. See, also, *The Irving F. Ross*, 8 F. 2d 313 (D. Mass.).²⁹

In this light, it becomes clear that under both the general maritime law and the Limitations Act of 1851 an owner cannot escape *in personam* liability for his negligence by abandoning his vessel.³⁰ As we now show, the Rivers and Harbors Act of 1899 did not change this rule.

3. The first sentence of Section 15 of the Rivers and Harbors Act, as previously noted, makes it unlawful "to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels." The second and final sentence of Section 15 then provides:

²⁹ The owner bears the burden of proving lack of privity or knowledge. See *Coryell v. Phipps*, 317 U.S. 406, 409-410; cf. *The Pennsylvania*, 19 Wall. 125, 136.

³⁰ In cases involving corporate vessel owners, the rule is that "liability may not be limited under the statute where the negligence is that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred". *Coryell v. Phipps*, 317 U.S. 406, citing *Spenser Kellog & Sons v. Hicks*, 285 U.S. 502; see *Craig v. Continental Ins Co.*, 141 U.S. 638, 646-47.

-A general discussion of the "without the privity or knowledge" condition of limiting liability is found in Gilmore & Black, *Law of Admiralty* §§ 10-20 to 10-25 (1957). The specific acts of negligence alleged in the libels (R. 17, 26-28) are of the type that are imputable to the owner as establishing "privity or knowledge."

Of course the Limitation of Liability Act would in no event be available to immunize those petitioners who were not owners or charterers of the sunken vessels. See 46 U.S.C. 186.

And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411-416, 418, and 502 of this title.

This section is supplemented by Section 19, 33 U.S.C. 414 (set forth pp. 57-58 *infra*), which provides that when a sunken vessel obstructs navigation "and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time," the sunken vessel may be removed and sold by the Secretary of the Army at his discretion and the proceeds paid into the Treasury of the United States.³¹

Petitioners claim that these sections "preserved" (Pet. Br. p. 18) a pre-existing right to avoid liability by abandonment. We have seen, however, that the

³¹ In an emergency, Section 20, 33 U.S.C. 415 (set forth, pp. 58-59 *infra*), permits the Secretary to remove a wreck summarily, the cost of the removal becoming a lien on the vessel and the owner ultimately being required to pay the cost of removal or forfeit his interest in the wreck.

general maritime law recognized no such right where the owner had been negligent. The question then arises whether these sections were intended to create such a right to avoid *in personam* liability. The answer must be in the negative. The legislative background of the Act, its text, and its purpose, demonstrate that no such right is created; rather, liability for negligence was continued in accordance with the general maritime law and the Limitations Act.

a. A review of the development of the provisions of 1899 Act will help furnish perspective. Congress first manifested its concern with the problem of sunken vessels obstructing the navigability of inland waterways in Section 4 of the Rivers and Harbors Act of June 14, 1880, 21 Stat. 180, 197.³² That section

³² That section provides:

"Whenever hereafter the navigation of any river, lake, harbor, or bay, or other navigable water of the United States, shall be obstructed or endangered by any sunken vessel or water-craft, it shall be the duty of the Secretary of War, upon satisfactory information thereof, to cause reasonable notice, of not less than thirty days, to be given, personally or by publication, at least once a week in the newspaper published nearest the locality of such sunken vessel or craft, to all persons interested in such vessel or craft, or in the cargo thereof, of the purpose of said Secretary, unless such vessel or craft shall be removed as soon thereafter as practicable by the parties interested therein, to cause the same to be removed. If such sunken vessel or craft and cargo shall not be removed by the parties interested therein as soon as practicable after the date of the giving of such notice, by publication, or after such personal service of notice, as the case may be, such sunken vessel or craft shall be treated as abandoned and derelict, and the Secretary of War shall proceed to remove the same. Such sunken vessel or craft and cargo and all property therein when so removed shall, after reasonable notice of the time and place of sale, be sold to the highest bidder or bidders for cash, and the proceeds of such sales shall

provided that when a sunken vessel obstructed a navigable body of water, the Secretary of War was required to give reasonable notice to all persons interested in the sunken vessel or its cargo that he intended to cause its removal. If the sunken vessel and its cargo were not removed "as soon as practicable" after the date of notice, the statute declared, "such sunken vessel or craft shall be treated as abandoned and derelict, and the Secretary of War shall proceed to remove the same." Although formal legislative history of this Section is barren,³³ the congressional intent in enacting it is, we believe, apparent. In terms, Section 4 conferred upon the Secretary of War the right to treat a wreck as "abandoned and derelict" so as to enable him to remove it if its owner failed to do so. The section was not concerned with conferring upon the vessel owner any right to avoid liability by abandoning his vessel. In this legislation Congress did not purport to alter traditional maritime responsibilities or revamp the rule of the 1851 Limitation Act that the owner of a sunken vessel could limit his liability to his interest in the vessel be deposited in the Treasury of the United States to the credit of a fund for the removal of such obstructions to navigation, under the direction of the Secretary of War, and to be paid out for that purpose on his requisition therefor. * * *

³³ As with most legislation relating to obstructions to navigation, Section 4 was tacked on to an appropriations bill for river and harbor improvement and construction. Accordingly, this provision is not dealt with in the congressional debates of the bill. And, since the requirement of a committee report was suspended with respect to this bill (see 10 Cong. Rec., Pt. 4, 3437 (1880)), we do not have the benefit of the House committee's views on this bill or the particular section.

only if the sinking occurred "without the privity or knowledge of such owner." To the contrary, Congress was concerned only with establishing the right and immunity of the Secretary of War to remove a sunken vessel without incurring liability to its owner, and it accomplished this purpose by permitting him to treat the vessel as "abandoned and derelict," leaving the question of the right of vessel owner to limit his liability to the Limitation of Liability Act.

In 1882, Congress "enlarged" the power granted the Secretary of War in Section 4 of the 1880 Act by authorizing him to sell a sunken vessel before it was raised or removed. Rivers and Harbors Act of 1882, 22 Stat. 191, 208-209.³⁴ Then, in 1890, without repealing either the 1880 or 1882 provisions, Congress provided in Section 8 of the River and Harbor Act of that year (26 Stat. 426, 454):

That all wrecks of vessels and other obstructions to the navigation of any port, roadstead, harbor, or navigable river, or other navigable waters of the United States, which may have been permitted by the owners thereof or the parties by whom they were caused to remain to

³⁴ That provision stated: "[T]he power and authority granted to the Secretary of War under and by virtue of section four of the act of Congress approved June fourteenth, eighteen hundred and eighty, relating to wrecks and sunken vessels be, and the same are hereby, enlarged so the Secretary of War may, in his discretion, sell and dispose of any such sunken craft, vessel, or cargo, or property therein, before the raising or removal thereof, according to the same regulations that are in the said act prescribed for the sale of the same after the removal thereof; and all laws and parts of laws inconsistent herewith are hereby repealed."

the injury of commerce and navigation for a longer period than two months, shall be subject to be broken up and removed by the Secretary of War, without liability for damage to the owners of the same.

In both the 1882 and 1890 Acts—as was the case with the 1880 Act—Congress ignored the possible liability of the vessel owner, leaving that question to the Limitation of Liability Act. Again, the congressional purpose was merely to devise an expedient method of enabling the Secretary of War to remove wrecked vessels without exposing the government to claims for damages brought by the owner of the wrecked vessel.

Finally, in 1899 Congress enacted the legislation with which we are now concerned. As already noted (pp. 12-13 *supra*), this Act made “no essential changes in the existing law,” being only a “codification of existing laws pertaining to rivers and harbors.” 32 Cong. Rec., Pt. 3, 2923 (1899). Congress eschewed any intention to work substantive alterations in the maritime law, and could not, therefore, have intended that the Act enlarge the rights of vessel owners. Accordingly, when Section 15 of the Rivers and Harbors Act of 1899 declared that “* * * it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States * * *,” it was not conferring a novel absolute *right* of abandonment upon the vessel owner. Instead, Congress left unchanged the principle of general maritime law and

the Limitations Act that only a vessel owner who is not at fault may absolve himself of *in personam* liability by abandoning his vessel.

b. The language employed in the provisions dealing with abandonment suggests that Congress was concerned solely with the question of the liability of the Secretary of War for the removal of vessels, rather than the limitation of liability of vessel owners. The provisions only "regulate the relationship between the Secretary and the owner of a wreck," *The Texmar*, *supra*, 319 F. 2d at 524 (Browning, J., dissenting),³⁵ and result in the "creation of a right in favor of the United States" and "not the grant of a personal immunity to the shipowner" *Bethlehem Steel*, *supra*, 374 F. 2d at 671 (Sobeloff, J., dissenting). Accordingly, only the government—not vessel owners—may invoke these provisions as a defense to liability. See *The Port Hunter*, 6 F. Supp. 1009 (D. Mass.); *Gulf Coast Transp. Co. v. Ruddock-Orleans Cypress Co.*, 17 F. 2d 858 (E.D. La.).

Moreover, specific provisions of the Rivers and Harbors Act do strongly indicate that Congress contemplated liability for those responsible for the negligent sinking of vessels. Section 15 of the Act, declaring it unlawful to "voluntarily or carelessly" sink a

³⁵ The majority opinion (per Judge Madden of the Court of Claims sitting by designation; Circuit Judge Duniway wrote a separate concurring opinion), expressed the belief that the Rivers and Harbors Act permitted a negligent vessel owner to abandon with impunity. As Judge Browning noted in his dissent, 319 F. 2d at 525, fn. 11, the cases relied upon by the majority and catalogued by petitioners and *amici curiae* either involved non-negligent vessel owners or never reached the issue of limitation of liability due to abandonment.

vessel, groups the negligent with the willful. This juxtapositioning militates against different treatment with respect to personal liability. *Bethlehem Steel, supra*, 374 F. 2d at 670 (dissenting opinion). Since it was settled by *United States v. Hall, supra*, prior to the 1899 compilation, that one who willfully sinks a vessel is subject to *in personam* liability, the statutory grouping indicates that the same liability follows for carelessly sinking a vessel. In addition, the first sentence of Section 15 explicitly proscribes the voluntary or careless sinking of vessels in a navigable channel. Construing the reference to abandonment in the next sentence as absolving such owners of liability would make the provisions of Section 15 inconsistent with each other, for this construction would in effect permit vessel owners to violate the first sentence's clear prohibition with impunity. Avoidance of such a contradiction is further reason why the Act should be read as allowing only the owner of a vessel that sinks without fault to avoid liability by abandonment.²⁶ See *In re Eastern Transp. Co.*, 102 F. Supp.

²⁶ As noted by the Fifth Circuit (R. 162), the mere fact that Congress appropriates funds for removing sunken vessels obstructing navigation, pursuant to 31 U.S.C. 725a(b)(14), does not indicate that Congress believes the government is required to bear the final costs of removing negligently sunken vessels. The government may use such funds to salvage vessels whose owners are unknown, or insolvent, or to salvage vessels which are sunk other than "voluntarily or carelessly". Furthermore, as the WYCHEM action illustrates, where the government decides not to delay in removing a wreck, public funds must be expended long before the costs can be recovered from those ultimately liable.

Similarly, the mere fact that in the 19th century Congress from time to time enacted appropriation bills to raise specified

913 (D. Md.), affirmed *sub nom. Ottenheimer v. Whitaker*, 198 F. 2d 289 (C.A. 4); *In the Matter of the Petition of Boat Demand, Inc.*, 174 F. Supp. 668 (D. Mass.); *Hagan v. City of Richmond*, 104 Va. 723, 734, 52 S.E. 385.

c. The Rivers and Harbors Act was enacted to keep the nation's navigable waters free from obstructions. Construing the provisions dealing with abandonment as creating an unqualified right of abandonment in negligent vessel owners is scarcely conducive to this end. Such a construction would impute to Congress an intention "inconsistent with the great design of this legislation." *Republic Steel, supra*, 362 U.S. at 492. In addition, it would create a conflict with the explicit policy expressed by Congress in the Limitations Act.³⁷ Nothing in the history or text of the congress-

wrecks does not indicate that Congress believed the government was required to bear the costs of removal of negligently sunken vessels. These appropriation bills, cited in petitioners' brief, pp. 8-9, may have covered the raising of wrecks sunk without fault. Or Congress might have decided to relieve a ship owner of liability in a particular instance.

³⁷ The petitioners argue (Pet. Br. p. 20) that it has been the policy of Congress to encourage water-borne commerce and that placing the burden of the cost of removal of negligently sunken vessels upon the government is part of that policy. Therefore, it is their position, even though the burden of imposing liability upon operators of vessels may be eased by insurance coverage to pay removal costs, see p. 6, fn. 8, and p. 23, fn. 21, *supra*, that operators of vessels, unlike operators of all other common carriers, are immune from personal liability for damage caused by their negligence. As Judge Sobeloff noted in his dissent in *Bethlehem Steel, supra*, 374 F. 2d at 672: "I have no quarrel * * * that the Government has long followed policies

sional plan permits this result.³⁸

d. Permitting the imposition of *in personam* liability on negligent vessel owners not only harmonizes all the provisions of the Act, and promotes its purposes, but is the only interpretation that is consistent with that given the Act by the Secretary of War within two years after the passage of the statute. In 1901, the Secretary of War, charged with the duty of administering the relevant portions of the Act, was asked where the burden lay for the removal of a

of encouragement and support of water-borne commerce and has been generous in the provision of subsidies in various forms. But nowhere has Congress manifested such unrestrained benevolence towards owners so as to warrant the implication of immunity from responsibility for the negligent sinking of vessels. It is an unwarranted extension of these policies for courts to dilute the clear congressional condemnation in section [15] of carelessness causing obstructions to navigation and the equally clear command to remove. * * *

³⁸ In 1964, the House Committee on Government Operations issued H. Rep. No. 1633, 88th Cong., 2d Sess., entitled *Reimbursement of Government Expenditures for Removal of Hazardous Substances*. The report noted (p. 5) the conflicting lower court decisions on the government's right to reimbursement under the Rivers and Harbors Act and concluded that Government efforts to obtain reimbursement were being hampered by "ambiguity or deficiency" in the provisions of the Act. (p. 4). Accordingly, the committee proposed legislation to "define" the Government's rights so as to clearly permit reimbursement (p. 5). To date, no legislation has been enacted amending the Act. The proposing of clarifying legislation and the nonaction of Congress on that legislation, of course, constitute scant evidence as to the proper construction of an Act. See *American Trucking Ass'ns v. Atchison T. & S. F. Ry.*, 387 U.S. 397, 416-418; *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597, 610; *Helvering v. Hallock*, 309 U.S. 106, 120. See also *United States v. DuPont & Co.*, 353 U.S. 586, 590.

The draft bills would define liability in accordance with the principles the government is urging before this Court.

sunken vessel. He replied: "It is believed the vessel constitutes an obstruction caused by the voluntary or careless acts of those owning or controlling the boat and that the burden of removal rests upon them" (R. 100-101). This early administrative interpretation was carried over into a formal administrative regulation published in 1946. 11 Fed. Reg. 177, A-828. The regulation now provides:

* * * a person who willfully or negligently permits a vessel to sink in navigable waters of the United States may not relieve himself from all liability by merely abandoning the wreck. He may be found guilty of a misdemeanor and punished by fine, imprisonment, or both, and in addition may have his license revoked or suspended. He may also be compelled to remove the wreck as a public nuisance or pay for its removal. [33 C.F.R. 209.410] [Reprinted fully, p. 60, *infra*].

This long-standing administrative construction,³⁹ while not conclusive, is entitled to great weight. *United States v. Republic Steel*, 362 U.S. 482, 490, note 5;

³⁹ Petitioners claim (Pet. Br. p. 16) that the administrative construction of the statute by the Department of the Army has not been consistent, citing a superseded Department of Army pamphlet, 27-164, "Military Reservations and Navigable Waters" (July 1961), pp. 181-82. The writer of the pamphlet, without referring to the above quoted regulation, stated that he believed that a claim for reimbursement for removal of a vessel may not be asserted against the owner of a vessel. The preface to the pamphlet notes that the views expressed therein "represent the opinion" of the writer and do "not purport to promulgate Department of Army policy". Thus the statement relied on by petitioners can in no way be viewed as a modification of the Army's long standing official policy as embodied in its regulation.

Cf. *Udall v. Tallman*, 380 U.S. 1, 16; *Federal Housing Administration v. The Darlington, Inc.* 358 U.S. 84.

In sum, the Rivers and Harbors Act makes the owner-petitioners liable *in personam* for the removal or cost of removal of vessels sunk due to their negligence, and they cannot avoid this statutory liability by abandoning their vessels. The liability of those petitioners who were not owners, but whose negligence also precipitated the sinkings, is unquestionable.

II. APART FROM STATUTORY LAW THOSE RESPONSIBLE FOR THE NEGLIGENT SINKING OF A VESSEL IN NAVIGABLE WATERS ARE REQUIRED TO REMOVE THE VESSEL OR PAY THE COST OF REMOVAL

For the reasons outlined in Point I above, we submit that the court below correctly concluded that the remedies sought by the government are readily inferable from the Rivers and Harbors Act. While we believe this Court need go no further, we now show that there is an additional independent ground for affirmance of the judgment of the court of appeals. Under the non-statutory law, not displaced or preempted by the Rivers and Harbors Act, the government has a right to compel those whose negligence causes a vessel to sink in navigable waters to remove the vessel or pay the cost of removal.

A. THE RIVERS AND HARBORS ACT DOES NOT PREEMPT NON-STATUTORY GROUNDS OF LIABILITY

Nothing in the Rivers and Harbors Act, or in any of the predecessor legislation, indicates that Congress intended that the statutory scheme should constitute the sole corpus of law governing the rights and duties

arising from the use of inland waterways. The 1899 Act was the result of a direction to the Secretary of War to compile all the "general laws that have been enacted from time to time *by Congress* for the maintenance, protection, and preservation of the navigable waters of the United States * * *." H. Doc. No. 293, 54th Cong., 2d Sess. (1897). (Emphasis added.) As we have already noted, this Act was not intended to alter the substance of pre-existing law, but was designed merely to organize and collate the legislative pronouncements in this area. Furthermore, the prime focus of the development of the rivers and harbors statutes was to assert the federal interest in the navigable waters and to clarify some of the relations between the government and the users of these waters. There was certainly no hint that anything was being done to constrict or replace the existing responsibilities of persons engaged in water-borne commerce, except insofar as inconsistent with the legislative judgments.⁴⁰

The English experience is illustrative. In 1847 Parliament passed the Harbours, Docks, and Piers Clauses Act, 32 & 33 Vict. ch. c., § 96, authorizing harbourmasters to remove wrecks and recover the costs of removal from the owner. Yet, in a variety of contexts, English

⁴⁰ Directing the abatement of an obstruction to the navigability of New York harbor, the New York Court of Appeals explained: "A statutory remedy never takes away a previous remedy at common law, unless such an intention is disclosed, but is always held to be cumulative merely." *People v. Vanderbilt*, 26 N.Y. 287, 294-295.

courts have ruled that this act, and the special local acts that conform to it, did not replace the common law prohibition on wilfully or negligently obstructing harbors or rivers "or preclude resort to ancient non-statutory remedies. This survival of non-statutory rights and liabilities was implicit in *The Crystal*, [1894] A.C. 508, 516, [1891-1894] All E.R. 804 (H.L.), and was made the express holding of the Court of Appeal in *Dee Conservancy Board v. McConnell*, [1928] 2 K.B. 159, 163-66, [1928] All E.R. 554 (Ct. Appl.), where the court ruled that, irrespective of the impact of the statute, the negligent sinking of a vessel in a waterway continued to be a tort at common law and the ensuing liability could not be retroactively purged by abandoning the vessel. That both statutory and non-statutory grounds for liability exist side by side is well recognized now in England. See *The Stonedale No. 1*, [1955] 2 All E.R. 689, 693 (H.L.); *The Liverpool (No. 2)*, [1960] 3 All E.R. 307, 311 (Ct. Appl.).

We submit that the same harmonious co-existence between these two sources of law should be recognized in the United States also. The Rivers and Harbors Act of 1899, as read by this Court in *Republic Steel, supra*, 362 U.S. at 486, was not an exhaustive definition of rights and remedies, but was a compilation of legislative pronouncements on the interests of the United States in the navigable waters. The Act made "no essential changes in the existing law". *Ibid.* It

⁴¹ See Wisdom, *Obstructions In Rivers*, 119 Just. P. 846 (1955); Desty, *A Manual of the Law Relating to Shipping and Admiralty* § 392 (1879).

did not, we submit, repeal or supersede the non-statutory rights asserted here, but rather left them intact.⁴²

Contrary to petitioners' assertion (Pet. Br. p. 37), the decision of this Court in *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, does not hold that there are no federal non-statutory rights that the government may assert nor does it preclude the United States from invoking non-statutory relief. The *Willamette* case involved the erection of a bridge across the Willamette River and the issue was whether the construction could be enjoined by a bill in equity in a federal court as a violation of the Act of Congress admitting Oregon to the Union. In considering whether, if that act could not apply to the construction of the bridge, the case was one arising under the Constitution or laws of the United States so as to confer jurisdiction on a federal court sitting in equity in a non-diversity case, it was stated, 125 U.S. at 8:

The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. *But until it does pass some such law*, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, *unless it be the maritime law, administered by the courts of admiralty and marine jurisdiction*. No precedent,

⁴² In fact, the form of repealer inserted into the 1899 Act (see 30 Stat. 1155) was of the nineteenth-century style which did not repeal by implication, but left intact existing consistent laws. See *Henderson's Tobacco*, 11 Wall. 652, 656.

however, exists for the enforcement of any such law; and if such law could be enforced, (a point which we do not undertake to decide,) it would not avail to sustain the bill in equity filed in the original case. [Emphasis added.]

Immediately after the decision—and as a direct result of it—Congress extended the interest of the United States to all its navigable waters by enacting the Rivers and Harbors Act of 1890, 26 Stat. 426, 454.⁴³ See, also, *In re Debs*, 158 U.S. 564, 586. When Congress, by the 1890 Act, extended the regulatory interest of the United States to include all navigable waters, the traditional rights of the sovereign attached, and the principles of maritime law were “federalized” and made the subject of application and development by the federal courts. Moreover, as was expressly noted in *Willamette*, the rationale was concerned solely with the relief a federal court of equity could grant, since the issue of what relief could be granted by a federal court sitting in admiralty and applying principles of maritime law was not before the court. A further factor making inapplicable the Court’s finding in *Willamette* that relief was unavailable is the existence of proprietary rights of the United States arising out of improvements to the Mississippi River. The *Willamette* decision made clear that had

⁴³ That statute is the predecessor of the present statute enacted in 1899 and was introduced in Congress by Senator Dolph who had represented the defeated party in the *Willamette Bridge* case. The debates show that the Act was intended to remedy the result of that decision. 21 Cong. Rec., Pt. 9, pp. 8604-8605 (1890). As this Court remarked in *Republic Steel*, *supra*, 362 U.S. at 488, the legislation was intended “to fill the gap created by *Willamette* * * *.”

there been "any interference with the operations, constructions, or improvements made by the general government" a federal equity court would have been able to grant relief to remove the obstruction causing the interference. 125 U.S. at 13-14. Thus, *Willamette* in no way undercuts the existence of a body of non-statutory federal law or precludes the United States from resorting to this distinct source of rights to protect its regulatory and proprietary interests. (see R. 21).

The remaining inquiry, then, is to ascertain the nature of the non-statutory rights on which the government may rely.

B. PETITIONERS' NEGLIGENCE CREATED PUBLIC NUISANCES WHICH THEY MUST ABATE OR PAY THE COST OF ABATING.

At common law, the creation of an obstruction in a public highway, including a navigable river," was deemed a public nuisance. *Mayor et al. of Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 97; see Prosser, *Torts*, 401-402 (2d ed. 1955); Comment, *Substantive and Remedial Problems in Preventing Interferences with Navigation: The Republic Steel Case*, 59 Colum. L. Rev. 1065, 1067 (1959). This principle applies when the obstruction in the river is a vessel, unlawfully moored or sunk. See *F. S. Royster Guano Co. v. Outten*, 226 Fed. 484, 486 (C.A. 4); *Carver v. San Pedro, L. A., & S.L.R.*, 151 Fed. 334 (C.C.S.D. Calif.); *The Ella*, [1915] P. 111; *King v. Ward*, 6 Ad. & El. 384 (K.B. 1836); *Rose v. Miles*, 4 Miles & Selwyn 101 (K.B.

⁴⁴ See 33 U.S.C. 10: "All the navigable rivers * * * in the former Territories of Orleans and Louisiana shall be and forever remain public highways."

1815); 4 Shearmen & Redfield, *Negligence*, p. 1866 (rev. ed 1941). See also *United States v. Hall*, 63 Fed. 472, 474 (C.A. 1); *Boston & Hingham Steamboat Co. v. Munson*, 117 Mass. 34; *Miller v. Chatterton*, 46 Minn. 338, 48 N.W. 1109; *King v. Russell*, 9 D & R 566 (K.B. 1827); *King v. Watts*, 2 Esp. 675, 170 Eng. Rep. 493 (Assizes, 1798).

From the earliest times, courts have exercised injunctive powers to compel those responsible for creating a nuisance by obstructing a navigable river to abate the nuisance and remove the obstruction. See, e.g., *Mayor et al. of Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 97; *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 150, 4 Pac. 1152; *Viebahn v. Board of County Comm'rs*, 96 Minn. 276, 104 N.W. 1089; *Attorney-General v. Earl of Lonsdale*, 20 L.T. 64, 67 (V.C. 1868); *Attorney-General v. Terry*, L.R. 9 Ch. 423, 432 (Ch. App. 1874); *Attorney-General v. Parmeter*, 10 Price 378, 410-411 (Ex. 1811), affirmed *sub nom. Parmeter v. Gibbs*, 10 Price 412 (H.L. 1813); 2 Story, *Equity Jurisprudence* § 1248 (14th ed. 1918). Generally, a person suffering specific damage because of a public nuisance may abate the nuisance himself and recover the costs. See, e.g., *City of Harrisonville v. W. S. Dickey Clay Mfg. Co.*, 61 F. 2d 210, 213 (C.A. 8), reversed on other grounds, 289 U.S. 334; *City of Concord v. Burleigh*, 67 N.H. 106, 36 Atl. 606; *State of Texas v. Goodnight*, 70 Tex. 682, 11 S.W. 119; *Barclay v. Commonwealth*, 25 Pa. 503; 3 Sedgwick, *Damages*, p. 1958 (9th ed). See, also, *Restatement of*

Restitution § 115 (1937 ed.). Thus, an owner of a negligently sunken vessel can be compelled to abate the nuisance so created or to pay the cost of removal of the vessel by others. As stated by the English admiralty court in *The Ella*, [1915] P. 111, 121:

Moreover, by the fault of the defendants or their servants, a public nuisance was created by the obstruction of the channel, and the expenditure of money by the harbor authority in abating the nuisance, whether pursuant to a right, or in performance of an obligation, constituted special damage [citation omitted].

Accordingly, I am of the opinion that the defendants are liable to make good to the plaintiffs the expenses incurred by them in buoying, lighting, marking, and subsequently removing the wreck by blowing it up, whether the case is regarded from the point of view of the breach of duty or negligence of the defendants, or from that of a public nuisance caused through their fault. * * * ⁴⁵

⁴⁵ Besides creating an abatable nuisance, negligence resulting in the sinking of a vessel also constitutes a maritime tort. "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." *The Plymouth*, 3 Wall. 20, 36; see *The Liverpool* (No. 2), [1960] 3 All E.R. 307, 311 (Ct. Appl.). The instant libels thus also sounded in tort (See R. 12-13, 17, 20-21, 26-28). Cf. *Miller v. Chatterton*, 46 Minn. 338, 48 N.W. 1109 (1891); *Rose v. Miles*, 4 Miles & Selwyn 101 (K.B. 1815); compare *In the Matter of the Petition of Boat Demand, Inc.*, 174 F. Supp. 668 (D. Mass.); *Piscataqua Navigator Co. v. New York, N.H. & H.R.*, 89 Fed. 362 (D. Mass.); *Boston v. Hingham Steamboat Co. v. Munson*, 117 Mass. 34; *People v. Gold Run Ditch Mining Co.*, 66 Cal. 138, 147, 4 Pac. 1152.

C. THE UNITED STATES IS ENTITLED TO COMPEL ABATEMENT OF A
NUISANCE IN NAVIGABLE WATERS OR TO RECOVER THE COSTS OF
ABATEMENT

Because of its interest in navigable rivers, the United States is entitled to invoke the body of non-statutory law outlined above to compel abatement of the nuisances created by petitioners, or recover the reasonable costs of abating the nuisances itself. The United States has a twofold interest in the Mississippi River, regulatory and proprietary.⁴⁶ Since it has long been settled that in any area in which the United States has a regulatory or proprietary interest, it has the concomitant right to protect and maintain that interest, the United States has the inherent non-statutory right to compel the abatement of the nuisances created by petitioners, or to recover the costs of abating it. See *Cotton v. United States*, 11 How. 228; *United States v. San Jacinto Tin Co.*, 125 U.S. 273; *In re Debs*, 158 U.S. 564. See, also, *Sanitary District v. United States*, 266 U.S. 405, 425-426; *United States v. Republic Steel*, *supra*.

The regulatory interest of the United States arises primarily from the power conferred upon it by Article I, Section 8, of the Constitution "To regulate Commerce with foreign Nations, and among the several States." Pursuant to this authority, the United States has engaged in extensive regulation of navigation on the rivers of the nation (see, *e.g.*, Title 33 of the United States Code) and has acquired and as-

⁴⁶ Also involved is the interest of the United States in protecting the health and welfare of its citizens against the perils of the 2,220,000 pounds of chlorine gas. Cf. *In re Debs*, 158 U.S. 564, 584.

serted an interest in keeping navigable waters free of obstructions. This interest is sufficient to permit the Attorney General "by virtue of his office" to bring a suit to enjoin and remove an obstruction and "no statute is necessary to authorize the suit." *Sanitary District v. United States*, *supra*, 266 U.S. at 426; *Republic Steel*, *supra*, 362 U.S. at 492; *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 566; *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518, 563; see *United States v. Hall*, *supra*, 63 Fed. at 473-474; *North Bloomfield Gravel Mining Co. v. United States*, *supra*, 88 Fed. at 677-678; cf. *In re Debs*, *supra*, 158 U.S. at 586; compare *The Ella*, [1915] P. 111; *Attorney-General v. Johnson*, 2 Wils. Ch. 87, 37 Eng. Rep. 240 (Ch. 1819). As this Court stated in *United States v. San Jacinto Tin Co.*, *supra*, 125 U.S. at 279, even absent specific statutory authority, the Attorney General may institute a suit to assert the interests of the United States, since he "is undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government."

Similarly, the United States through the Attorney General may assert its right and duty to protect its proprietary interest in the nation's waterways. The navigable waters are the "property of the nation" in the charge of the United States government. *In re Debs*, *supra*, 158 U.S. at 586, quoting *Gilman v. Philadelphia*, 3 Wall. 713, 724; see, also, *Sanitary District v. United States*, *supra*, 266 U.S. 425. Any injury to the navigable capacity of the waters is an

"injury to property rights". *North Bloomfield Gravel Mining Co. v. United States*, *supra*, 88 Fed. at 677. Moreover, the United States has a proprietary interest in the Mississippi River due to the expenditures of monies for various river improvements. As the libel in the WYCHEM case alleges, the United States has made substantial improvements to the Mississippi to improve navigation, to prevent floods and to promote and facilitate commerce, trade and the postal service (R. 21). "The exact amount of federal property on the banks and levees in articulated mats, revetments, dikes, works, structures, buoys, beacons, lights, landings, vessels, on the part of the river within thirty miles of this chlorine and downriver from its then location is incalculable but substantial in nature."⁴⁷ (R. 21). To protect these improvements, the United States may invoke its non-statutory rights and seek relief through the courts. See, *e.g.*, *United States v. Duluth*, 25 Fed. Cas. 923 (No. 15,001) (C.C. D. Minn.) (Miller, Circuit Justice); *United States v. North Bloomfield Gravel Mining Co.*, 53 Fed. 625 (C.C. N.D. Calif.); *United States v. Mississippi and Rum River Boom Co.*, 3 Fed. 548 (C.C. D. Minn.); cf. *United States v. San Jacinto Tin Co.*, *supra*; *Cotton v. United States* *supra*; *Willamette Iron Bridge Co. v. Hatch*, *supra*, 125 U.S. at 13-14.

Accordingly, we conclude that these principles of non-statutory law may also be invoked by the United States to compel petitioners to remove the sunken

⁴⁷ These allegations were supported by affidavits to which were attached maps indicating the extent of these improvements (R. 85-86).

vessels or to recover from them the costs of removing the wrecks.⁴⁸

CONCLUSION

For the reasons above stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

CARL EARDLEY,
Acting Assistant Attorney General.

PHILIP A. LACOVARA,
Assistant to the Solicitor General.

ALAN S. ROSENTHAL,
NORMAN KNOPF,
Attorneys.

SEPTEMBER 1967.

⁴⁸ There is no substance to petitioners' suggestion (Pet. Br. pp. 36-37) that liability for the cost of removing the chlorine may not be imposed upon them because the chlorine was removed under the provisions of the Disaster Relief Act, 42 U.S.C. 1855 *et seq.* That Act was enacted for the benefit of state and local governments, 42 U.S.C. 1855, to provide federal assistance in disaster situations. The Act does not purport, either expressly or impliedly, to relieve private tortfeasors of liability for the consequences of their negligence. Cf. *United States v. State Road Department of Florida*, 189 F. 2d 591, 595 (C.A. 5), certiorari denied, 342 U.S. 903; *United States v. Perma Paving Co.*, *supra*, 322 F. 2d at 758.

APPENDIX

1. The Rivers and Harbors Act of March 3, 1899, 30 Stat. 1151, *et seq.*, as amended, 33 U.S.C. 401, *et seq.*, provides in pertinent part:

Section 10, 33 U.S.C. 403:

Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in.

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

* * * *

Section 12, 33 U.S.C. 406:

Penalty for wrongful construction of bridges, piers, etc.; removal of structures.

Every person and every corporation that shall violate any of the provisions of sections 401,

403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$2,500 nor less than \$500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

* * * * *

Section 15, 33 U.S.C. 409:

*Obstruction of navigable waters by vessels;
floating timber; marking and removal of
sunken vessels.*

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as "sack rafts of timber and logs" in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken

craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411-416, 418, and 502 of this title.

Section 16, 33 U.S.C. 411:

Penalty for wrongful deposit of refuse; use of or injury to harbor improvements, and obstruction of navigable waters generally.

Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$2,500 nor less than \$500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

Section 16, 33 U.S.C. 412:

Liability of masters, pilots, and so forth, and of vessels engaged in violations.

Any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section 407 of this title to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of the Army, or who shall willfully injure or destroy any work of the United States contemplated in section 408 of this title, or who shall willfully obstruct the channel of any

waterway in the manner contemplated in section 409 of this title, shall be deemed guilty of a violation of sections 401, 403, 404, 406, 407, 408, 409, 411-416, 418, 502, 549, 686, and 687 of this title, and shall upon conviction be punished as provided in section 411 of this title, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections 407, 408, and 409 of this title shall be liable for the pecuniary penalties specified in section 411 of this title, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof.

Section 17, 33 U.S.C. 413:

Duty of United States attorneys and other Federal officers in enforcement of provisions; arrest of offenders.

The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 403, 404, 406, 407, 408, 409, 411, 549, 686, and 687 of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Army or by any of the officials hereinafter designated, and it shall furthermore be the duty of said United States attorneys to report to the Attorney General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of the Army by the Attorney General; and for the better enforcement of the

said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of the Army, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the said sections, or who may violate any of the provisions of the same: *Provided*, That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further*, That whenever any arrest is made under such sections, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offense alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States.

Section 19, 33 U.S.C. 414:

Removal by Secretary of the Army of sunken water craft generally.

Whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel; boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of the Army at his discretion, without liability for any damage to the owners of the same: *Provided*,

That in his discretion, the Secretary of the Army may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed "To whom it may concern," in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof: *And provided also*, That the Secretary of the Army may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be solicited by public advertisement, giving reasonable notice of not less than ten days, for the removal of such obstruction as soon as possible after the expiration of the above specified thirty days' notice in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water craft, raft, or other obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the proposition most advantageous to the United States: *Provided*, That such bidder shall give satisfactory security to execute the work: *Provided further*, That any money received from the sale of any such wreck, or from any contractor for the removal of wrecks, under this paragraph shall be covered into the Treasury of the United States.

Section 20, 33 U.S.C. 415:

Summary removal of water craft obstructing navigation.

Under emergency, in the case of any vessel, boat, water craft, or raft, or other similiar obstruction, sinking or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in section 414 of this title, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secre-

tary of the Army, or any agent of the United States to whom the Secretary may delegate proper authority, the Secretary of the Army or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused, using his best judgment to prevent any unnecessary injury; and no one shall interfere with or prevent such removal or destruction: *Provided*, That the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it: *And provided further*, That the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States.

2. The Limitation of Vessel Owner's Liability Act of 1851, 9 Stat. 635, as amended, 46 U.S.C. 181-189, provides in pertinent part:

46 U.S.C. 183:

Amount of liability; loss of life or bodily injury; privity imputed to owner; "sea-going vessel."

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occa-

sioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. * * *

* * * * *

46 U.S.C. 186:

Charterer may be deemed owner.

The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

3. 33. Code of Federal Regulations § 209.410 provides:

Abandonment of wrecks.

By the maritime law the owner of a vessel which is sunk without fault on his part may abandon the wreck in which case he cannot be held responsible for removing it even though it obstructs navigation. That law has not been changed by sections 15, 19, and 20 of the River and Harbor Act of March 3, 1899 (30 Stat. 1152, 1154; 33 U.S.C. 409, 414, 415), which fully recognize the owner's right of abandonment. However, a person who willfully or negligently permits a vessel to sink in navigable waters of the United States may not relieve himself from all liability by merely abandoning the wreck. He may be found guilty of a misdemeanor and punished by fine, imprisonment, or both, and in addition may have his license revoked or suspended. He may also be compelled to remove the wreck as a public nuisance or to pay for its removal.





SUBJECT INDEX

	PAGE
Section 10 of the Rivers & Harbors Act (33 U.S.C. 403) does not apply to the negligent sinking of a vessel.....	1
Abandonment of a vessel takes place by virtue of the Rivers and Harbors Act, and this Statute has no connection with the Limitation Act.....	4
The Rivers and Harbors Act has preempted the field involving the removal of sunken vessels from navigable waters and the recovery of removal costs. The United States has no rights or remedies herein aside and apart from that Statute.....	6
A. The right to reimbursement for the expense of abating a public nuisance must be based upon express statutory authority.....	7
B. The United States does not have a proprietary interest in the Mississippi River. Its interest in maintaining the navigability of that stream does not entitle it to compel the abatement of a nuisance or recover the costs of abatement.....	13
Conclusion.....	17

TABLE OF AUTHORITIES CITED

Cases:

<i>Barraclough v. Brown</i> , [1897] A.C. 615, 8 Asp. Mar. Cas. 290.....	7
<i>City of Nashville v. Weakley</i> , 95 S.W. (2d) 37, 170 Tenn. 278.....	10
<i>City of Salem v. Eastern Railway Company</i> , 98 Mass. 431.....	10
<i>Crystal, The</i> , [1894] A.C. 508, [1891-1894] All E.R. 804 (H.L.).....	17

TABLE OF AUTHORITIES CITED—(Continued)

Cases: (Continued)	PAGE
<i>Dee Conservancy Board v. McConnell</i> , [1928] 2 K.B. 159 (C.A.)	17
<i>Ella, The</i> , [1915] P. 111	17
<i>Georgetown v. Alexandria Coal Company</i> , 12 Pet. 91	10, 12
<i>James v. Dravo Contracting Co.</i> , 302 U.S. 134	13
<i>Lindgren v. United States</i> , 281 U.S. 38	7
<i>Manhattan, The</i> , (<i>United States v. Atlantic Refin- ing Co.</i>), 10 F. Supp. 45 (E.D. Pa., 1935), <i>aff'd</i> 85 F. 2d 427 (3rd Cir. 1936)	17
<i>Port of Seattle v. Oregon & W. R.R. Co.</i> , 255 U.S. 56	13
<i>Sanitary District of Chicago v. United States</i> , 266 U.S. 405	7
<i>Second Employer's Liability Cases</i> , 223 U.S. 1	7
<i>Texmar, The</i> , 319 F. 2d 512 (C.A. 9, 1963), <i>cert.</i> <i>denied</i> 375 U.S. 966	8, 14, 15
<i>United States v. Hall</i> , 63 Fed. 472 (1st Cir. 1894)	2
<i>United States v. Moran Towing & Transportation Company</i> , 374 F. 2d 656 (C.A. 4, 1967)	3
<i>United States v. Perma Paving Company</i> , 332 F. 2d 754 (C.A. 2, 1964)	3
<i>United States v. Republic Steel Corporation</i> , 362 U.S. 482	3, 6, 15
<i>United States v. Rio Grande Dam and Irrigation Co.</i> , 174 U.S. 690	7
<i>United States v. Zubik</i> , 295 F. 2d 53 (C.A. 3, 1961)	15
<i>Village of Palmyra v. G. S. Warren, et al</i> , 114 Ill. App. 562 (3rd Dist., 1904)	9, 10
<i>White Star S.S. Co. v. North British & Merc. Ins. Co.</i> , 48 F. Supp. 808 (D.C. Mich., 1943)	16
<i>Willamette Iron Bridge Co. v. Hatch</i> , 125 U.S. 1	7

TABLE OF AUTHORITIES CITED—(Continued)

Federal Statutes:	PAGE
Limitation of Vessel Owner's Liability Act of 1851, 9 Stat. 635, as amended, 46 U.S.C. 181-189.....	4
Rivers and Harbors Act of 1882, 22 Stat. 209.....	17
Rivers and Harbor Act of March 3, 1899, 30 Stat. 1121, 1151, et seq. as amended.....	4
Sec. 10 (33 U.S.C. 403).....	1, 2, 3, 4, 16
Sec. 15 (10 U.S.C. 409).....	2
Sec. 19 (33 U.S.C. 414).....	2, 5, 11
Sec. 20 (33 U.S.C. 415).....	2
43 U.S.C. 1311.....	13
English Statutes:	
Harbours, Docks and Pier Clauses Act 1847, 10 and 11 Vict. c. 27.....	16
Port of London (Consolidation) Act, 1920, 10 and 11 Geo. 5 c. XXIII.....	16
Miscellaneous:	
12 Op. Atty. Gen. 494, 495.....	14

IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. 31

WYANDOTTE TRANSPORTATION COMPANY,
UNION BARGE LINE CORPORATION and
CARGILL, INC., et al.,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONERS.

This brief is submitted by petitioners Wyandotte Transportation Company, Union Barge Line Corporation and Cargill, Inc., et al, in reply to the brief for the United States of America.

ARGUMENT

**SECTION 10 OF THE RIVERS & HARBORS
ACT (33 U.S.C. 403) DOES NOT APPLY TO
THE NEGLIGENT SINKING OF A VESSEL**

The Government has taken the position that the provisions of § 10 (33 U.S.C. 403) of the Rivers & Harbors Act to the effect that "the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any waters * * *" are broad enough to include

the negligent sinking of a vessel in navigable waters. We have discussed this point in part in our original brief and will not reiterate that discussion herein. The Rivers & Harbors Act of 1899 has been characterized as a "great design" to insure the navigability of the natural waterways. By its terms § 10 prohibits the creation of any obstruction to the navigable capacity of any waters of the United States and provides that it shall not be lawful to build any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures. It is noteworthy that in the "great design" of this legislation no mention is made of the word "craft" or "vessel". These are plain, ordinary, garden-variety English words and are used extensively in other portions of the Statute. Their omission from § 10 could only have been a conscious act on the part of Congress, and is a strong indication of the intent of Congress to deal with the problem of sunken vessels in the Wreck Statute proper (33 U.S.C. 409, 414, and 415) and not in § 10 (33 U.S.C. 403).

Even if we concede, however, that a vessel may be an obstruction under § 10 (Section 403), the Government can gain no solace. § 10 (Section 403) by its terms does not apply to obstructions resulting from a negligent or unintentional act. See, for example, *United States vs. Hall*, 63 Fed. 472 (1894). In common usage "create" imports an intentional rather than a negligent act. This is borne out by the context in which "create" is used in § 10 (Section 403).

It would be ludicrous for Congress to prohibit the negligent creation of an obstruction to navigable waters "not affirmatively authorized by Congress". One cannot conceive of Congress authorizing a negligent obstruction in the first place; and, in the second place, if an obstruc-

tion is negligently created, Congress would never have the opportunity to "authorize" it. This same point was made by the Court of Appeals for the Fourth Circuit in the *United States vs. Moran Towing & Transportation Company*, 374 F. 2d 656 (1967)*, where the Court said (p. 668):

"* * * An intentional creation of an obstruction of a channel by the scuttling of a vessel has thus been made referable under § 412 to § 403 and its related provisions for mandatory injunctions, but a negligent sinking is not. This is consistent with the general statutory scheme, which we considered in Part I of this opinion. The kind of deliberately erected structure which § 403 contemplates, must be removed at the expense of the owner when it constituted an unauthorized obstruction of navigable waters, and an injunction is specifically authorized. In contrast, under the Wreck Act, the only expressed consequence of an owner's failure to remove a sunken vessel, if the obstruction was not 'wilfully' created, is to give the United States the right to treat it as abandoned, remove it, and retain the salvage. In this, the statutes draw no distinction between careless and innocent sinkings."

This construction of the statute is in harmony with *United States vs. Perma Paving Company*, 332 F. 2d 754 (CA 2, 1964), and *United States vs. Republic Steel Corporation*, 362 U.S. 482. Although under *Republic Steel* the types of obstruction prohibited by § 10 (Section 403) may not be limited to the types of "structures" referred to in that section; nevertheless, the fact remains that the wharves, piers, dolphins, etc. referred to in § 10 (Section 403) are all planned and intentionally created obstructions. The same is true of the fill involved in *Republic Steel* and the shoal involved in *Perma Paving*—both were intentional. *Republic Steel* consciously was dumping refuse in the river,

and the fill was a natural and foreseeable result thereof. Perma Paving intended to pile stone on the foreshore, and the creation of a shoal was a natural and foreseeable result of that action. The Government cannot point to any case in the jurisprudence other than the instant one, applying § 10 (Section 403) to a negligent sinking of a vessel.

**ABANDONMENT OF A VESSEL TAKES
PLACE BY VIRTUE OF THE RIVERS AND
HARBORS ACT, AND THIS STATUTE HAS
NO CONNECTION WITH THE LIMITATION
ACT**

The Government at several places in its brief¹ suggests that there is a close relationship between the Limitation of Vessel Owner's Liability Act of 1851 and the Rivers and Harbors Act of 1899. The legislative history of the Rivers and Harbors Act is bereft of any suggestion that this Statute is related to the Limitation Act. The intention of Congress in enacting the Limitation Act was to benefit a vessel owner by affording him, under appropriate circumstances, a means of curtailing the extent of his responsibility with respect to a marine disaster. The Limitation Act thus confers upon a vessel owner the right to limit his liability in respect of claims for personal injury and death and for damage to and loss of property, growing out of a marine casualty, to the value of his interest in the vessel and pending freight, provided the vessel owner is not privy to, and does not have knowledge of, the fault and neglect of his agents giving rise to his liability.

There is, in truth, no connection between the Limitation Act and the Rivers and Harbors Act; they involve different concepts and different purposes. Abandonment

¹ Pages 9, 27, 28, 33, 34, and 35.

of the vessel under the Rivers and Harbors Act is not a condition precedent to institution of limitation proceedings; and it has never been suggested that abandonment of a vessel under the Rivers and Harbors Act results in insulation of a vessel owner from claims for personal injury, death, or property loss and damage, growing out of the casualty which results in the sinking of the vessel. Rather, the extent of the vessel owner's liability, if any, for these claims is determined by the Limitation Act.

On the other hand, the Rivers and Harbors Act relates specifically to responsibility for the cost or expense of marking and of removing a vessel which has accidentally sunk in the navigable waters of the United States and has thus become a matter of public concern. By codifying the principle of abandonment,² the Rivers and Harbors Act thus makes provision for the transfer of ownership of a sunken vessel to, and the vesting of title in, the Government; establishes the mechanics of removal by the Government "without liability for any damage to the owners of the same" (See § 19, [Section 414]); and specifies and delineates the extent of the recourse of the Government as against all persons, affording the Government rights against, but limiting them to, the sunken vessel.

The Government apparently seeks to confuse the issue before the Court by making the suggestion, which is without foundation, that a relationship exists between the Limitation Act and the Rivers and Harbors Act.

² Abandonment may be accomplished either voluntarily or involuntarily; a sunken vessel is conclusively presumed to be abandoned after the passage of 30 days. See § 19. (Section 414).

THE RIVERS AND HARBORS ACT HAS PRE-EMPTED THE FIELD INVOLVING THE REMOVAL OF SUNKEN VESSELS FROM NAVIGABLE WATERS AND THE RECOVERY OF REMOVAL COSTS. THE UNITED STATES HAS NO RIGHTS OR REMEDIES HEREIN ASIDE AND APART FROM THAT STATUTE

The second portion of the Government's brief is devoted to a consideration of alleged non-statutory grounds of liability, with particular reference to the petitioners' obligation to abate the obstructions as public nuisances or pay the costs of abatement. (Resp. Br. pp. 40-48).

The Respondent made the same contention in the Court of Appeals below. That Court, however, found it necessary, in its imposition of *in personam* liability, to stay within the framework and the four corners of the Rivers and Harbors Act. (Rec. 150-165). Also, in *United States v. Republic Steel*, *supra*, this Court, in order to grant the Government the relief requested, found that the industrial deposits referred to **created an obstruction under the Rivers and Harbors Act**. Aside and apart from the terms of that Statute, the United States could not have prevailed in that case. See 362 U.S. at page 493.

The Rivers and Harbors Act of 1899, described by this Court in *Republic Steel* as having as its "great design" the protection of the navigable capacity of the United States, has preempted that field, the effect of which is to require the national sovereign to look to its own legislation and to that alone for the relief which it seeks. Congress, having reaffirmed its national control over navigable streams by enacting the statute in question, has preempted that field and resort may not be had to non-statutory

remedies, even if they existed. This Court has long recognized that principle. *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 708; *Sanitary District of Chicago v. United States*, 266 U.S. 405, 426; *Second Employers' Liability Cases*, 223 U.S. 1, 53; *Lindgren v. United States*, 281 U.S. 38, 44.

In an attempt to escape the binding effect of the above-mentioned doctrine, the Government contends that a statutory remedy does not take away a previous remedy at common law, unless such an intention is disclosed. (Resp. Br. p. 41). Here, no previous remedy at common law existed, *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8, so we are not confronted with statutory and non-statutory remedies going hand in hand.

The Government's reliance upon the English decisions is not justified. (Resp. Br. pp. 41, 42). In *Barraclough v. Brown*, (1897) A.C. 615, 8 Asp. Mar. Cas. 290, 291, 292, the House of Lords stated that at common law there was no liability to pay the expenses of removing an abandoned wreck from a navigable river.

A.

THE RIGHT TO REIMBURSEMENT FOR THE EXPENSE OF ABATING A PUBLIC NUISANCE MUST BE BASED UPON EXPRESS STATU- TORY AUTHORITY.

We do not concede that the vessels herein constituted nuisances, subject to abatement. If, however, they are held to be in that category, they are public rather than private nuisances, and the right to abate a public nuisance and to recover the expenses of doing so must be statutorily conferred.

The argument advanced by the Government in connection with this issue (Resp. Br. pp. 45-47) is almost without precedent. Apparently, the only other case in which the Government asserted both a statutory and a common law basis for its claim is *The Texmar*, (*United States v. Bethlehem Steel Corp.*), 319 F. 2d 512 (C.A. 9, 1963), cert. denied 375 U.S. 966, and there the claim was rejected on both grounds. In discussing the alleged common law basis, that Court said (p. 519) :

"The decisions which we have cited constitute an impressive body of authority. There is no decision to the contrary. The Government cites a number of cases in which private proprietors of wharfage or dock space were allowed to recover damages for the obstruction of access to their docks or wharves. *Petition of Boat Demand, Inc.*, 174 F. Supp. 668 (D.C. Mass.); *The Irving F. Ross*, 8 F. 2d 313 (D.C. Mass.); *In re Eastern Transportation Co.*, 102 F. Supp. 913 (D.C. Md.). It cites English decisions under statutes which expressly provide that the owner of a wreck shall bear the expense of removing it from a channel. These decisions are of no assistance in our task of interpreting the Rivers and Harbors Act, or in determining whether, apart from the Act, there is a common law obligation owing to the United States in a case such as the instant one. In *Willamette Iron Bridge Co. v. Hatch*, supra, 125 U.S. 1, 8 S. Ct. 811, 31 L. Ed. 629, the Supreme Court held that there was no common law of the United States prohibiting obstructions and nuisances in navigable channels. That decision never having been overruled, it is not surprising that no inferior federal court has discussed the question of obstructions of channels and expenditures made by the United States in removing those obstructions on the assumption that there might be an applicable common law doctrine. Indeed, in the case of United

States v. Zubik, *supra*, 295 F. 2d 53 (Cir. 3), the United States did not claim that it had a common law right to reimbursement. *United States v. Republic Steel Corporation*, *supra*, 362 U.S. 482, 80 S. Ct. 884, 4 L. Ed. 2d 903, on which the Government relies in our case, was urged upon the court in Zubik, but not as having overruled *Willamette*, or held that the United States had common law rights in the navigability of channels. What was urged in Zubik was that enough could be found in the statutes to justify a judgment against Zubik, since the Supreme Court had found enough in the statutes to justify a judgment against Republic Steel. We conclude, then, that there has been, and is, no common law basis for a recovery by the Government, and that a judgment in its favor would have to find its basis in the Acts of Congress."

It should also be pointed out that in the instant case the Court below did not rule on this issue.

In the situations where States and municipalities have acted to abate public nuisances, the right to recover expenses has, without exception, been based upon specific provisions contained in the statutes or ordinances authorizing the abatement. The same requirements should and do apply to the national sovereign.

The applicable principle is set forth in the *Village of Palmyra v. G. S. Warren, et al*, 114 Ill. App. 562 (3rd Dist., 1904). In that case a millpond, owned by the defendants, was declared to be a public nuisance by the City Board of Trustees. A notice to fill the pond within ten days was disregarded. The State Board of Health then directed the Village to fill the pond and do whatever was necessary to put it in a sanitary condition. This was done and suit was brought to impose a lien upon the property for the amount

expended in abating the nuisance and for the sale of the property to satisfy the lien.

The Court referred to the state statutes which conferred authority on the part of the cities, villages and towns to declare the existence of nuisances and to take action to abate them. **Those statutes provided for the imposition of fines upon parties who created or suffered nuisances to exist but there was no provision for recovery of the expenses of abatement or the imposing of a lien against the property involved.** In ruling against the plaintiff, the Court said (p. 567) :

"The foregoing constitute the only powers conferred by statutes upon municipalities, relating to the subject of nuisance. It will be observed that no power is therein conferred upon municipalities by either ordinance, resolution or regulation to impose upon any person or property, real or personal, the cost of abating a nuisance existing thereon or arising therefrom. It follows that there was no legal obligation to pay the expense of abating the nuisance in question, and, therefore, no promise to pay the same could be implied. * * *" (Emphasis supplied)

In the above case, absence of statutory authority to recover the costs of abatement was fatal to the plaintiff's cause. That principle applies here with equal force. The various aspects of the law relating to public nuisances is discussed by this Court in the leading case of *Georgetown v. Alexandria Coal Company*, 12 Pet. 91.

Also see: *City of Salem v. Eastern Railway Company*, 98 Mass. 431; *City of Nashville v. Weakley*, 95 S.W. (2d) 37, 170 Tenn. 278.

The statute under which the Government acted in

abating the alleged nuisance in the *Wychem* case and the factors which prompted that action are set forth in a letter dated September 25, 1962 from Colonel Warren S. Everett, District Engineer, Vicksburg District, Corps of Engineers, to Wyandotte Transportation Company (Exhibit D. R. 42, 43). The relevant portions are as follows:

"We received your letter of 21 August 1962 stating that you planned to make a further search and resurvey of the reported sinking area of the Barge *Wychem* 112 and requesting information about river levels, the speed of the current and bottom contour changes in that area. However, we have delayed answering your letter since subsequent to our advice to you on 26 July 1962, the Secretary of the Army reconsidered the determination as to obstruction and found that it was in fact an obstruction to navigation. We are, therefore, proceeding under authority of the Secretary of the Army to remove the chlorine Barge *Wychem* 112 under provisions of Section 19 of the River and Harbor Act of 3 March 1899 (33 U.S.C.A. 414).

"We have located the sunken Barge *Wychem* 112 and are proceeding immediately to conduct salvage operations.

"Accordingly, in view of the very grave danger to public health and to navigation that will exist until we remove the chlorine cargo from the Mississippi River, we hereby accept your tender of abandonment of 14 November 1961. The United States will assume full responsibility for the removal and disposal of the Barge *Wychem* 112 and its cargo. After recovery of the Barge *Wychem* 112 and/or its cargo, the United States will retain the right of possession and title thereto as salvor." (Emphasis supplied)

Assuming, *arguendo*, that the sunken barge and her

cargo constituted, as Colonel Everett states, "a very grave danger to public health and to navigation", and was, therefore, a public nuisance, there were no provisions in the statute under which Colonel Everett stated he was acting which made the expenses of abatement a charge against those allegedly responsible for creating the nuisance nor authorized the bringing of suit for the collection of such charges.

The Government's right to retain possession of the Barge Wychem 112 and/or its cargo is accorded by the statute upon which he relied. The provisions of that statute do not, however, accord any other means of securing reimbursement, whether the expenses are described as damages, expenses of removal or costs of abatement. This is a far cry from a statute which expressly provides for the abatement of a public nuisance and expressly provides that the person responsible for the nuisance shall pay the costs of abatement. In the absence of such a statute, the right to recover such costs does not exist.

We do not dispute the general doctrine that if a particular individual shall have sustained special damage by reason of the existence of a public nuisance he may maintain a private action for that damage. This Court in *Georgetown v. Alexandria Coal Company, supra*, affirmed that doctrine. These suits are not in that category, and the decisions upon which the Government relies (Resp. Br. p. 46) are not in point.

B.

THE UNITED STATES DOES NOT HAVE A PROPRIETARY INTEREST IN THE MISSISSIPPI RIVER. ITS INTEREST IN MAINTAINING THE NAVIGABILITY OF THAT STREAM DOES NOT ENTITLE IT TO COMPEL THE ABATEMENT OF A NUISANCE OR RECOVER THE COSTS OF ABATEMENT.

The Government asserts that by reason of its two-fold interest in the Mississippi River, regulatory and proprietary, it has an inherent non-statutory right to compel the abatement of the nuisances created by petitioners or to recover the costs of abating them. (Resp. Br. p. 48)..

The United States does not own the bed of the Mississippi River. Its interest in that stream is not proprietary and is confined to the control thereof for navigation purposes. 43 U.S.C. § 1311 provides, in substance, that title to and ownership of the lands beneath the navigable waters of the respective States are in the States subject to the authority and rights of the United States respecting navigation, flood control and the production of power.

This Court, in *Port of Seattle v. Oregon & W. R.R. Co.*, 255 U.S. 56, which involved a determination of the ownership of the navigable water within the State of Washington, said (p. 63):

“The right of the United States in the navigable waters is limited to the control thereof for purposes of navigation. * * *”

Again, in *James v. Dravo Contracting Co.*, 302 U.S. 134, this Court stated (p. 140):

“The title to the beds of the rivers was in the

State. (Citing cases). It was subject to the power of Congress to use the lands under the streams 'for any structure which the interest of navigation, in its judgment may require,' * * * :

The interest which the United States had in removing the Wychem 112 and its cargo, and in attempting to compel the removal of the LI and M65, arose out of its general governmental duty to aid navigation and commerce. See: 12 Op. Atty. Gen. 494, 495.

The alleged expenditure of Federal monies for improvements to the Mississippi River to improve navigation, prevent floods and facilitate commerce does not create a proprietary interest in that stream. A regulatory interest, standing alone, is not sufficient to warrant an action for abatement.

The argument that the United States, as a proprietor, had the same right as a private citizen to seek relief at common law was advanced in *The Texmar*, *supra*, and was rejected there. At 319 F. 2d at page 517, the Court said:

"The appellees point out that the United States is not the proprietor of navigable channels such as the one obstructed by the appellees' ship; that the Government's interest in the navigability of such channels arises out of the Constitutional power of Congress to regulate interstate and foreign commerce; that the Government's interest, therefore, is a regulatory and not a proprietary interest.

"We think there may be merit in this argument of the appellee. In *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8 S. Ct. 811, 31 L. Ed. 629, the Supreme Court, contrary to a prior opinion of the Attorney General, 6 Op. Atty. Gen. 172, 184, held that there was no federal common law prohibiting

obstructions of navigable waters, because Congress had not asserted an interest in such waters by regulating their use, or otherwise. Congress thereafter enacted statutes pertaining to the obstruction of navigable waters, 26 Stat. 426, 454. Against this background, a court should search the statutes carefully to see if they contain answers to legal questions in this area, and should be hesitant about imposing important legal obligations not expressed or fairly clearly implied in the numerous detailed regulatory statutes enacted by Congress."

The citing of *Republic Steel* in support of its contention that the United States has the inherent non-statutory right to compel the abatement of nuisances or recover the costs of abatement (Resp. Br. p. 48) is clearly without justification. It is apparent from the briefs filed by the Government in the second *Zubik* (295 F. 2d 53 [C.A. 3, 1961]) and *Texmar* cases and in the Court below that *Republic Steel* was considered by the Attorney General's office not as creating a right to sue for nuisance, but as the basis for extensions of the Rivers and Harbors Act. In other words, the Government was of the view that this Court, having extended the Statute in *Republic Steel* to apply to industrial deposits, should extend it to sunken vessels so as to grant the *in personam* relief sought. The contention that *Republic Steel* stands for the right to sue for nuisance is a new one and is completely unwarranted.

We have examined the other decisions cited by the Respondent on page 48 of its brief. A complete answer to those cases is that even if it be conceded that the United States has an interest in the Mississippi River that interest, as it applies to sunken vessels, is afforded complete protection by the provisions of the Wreck Statute. No other or different protection is authorized or required.

We suggest that the vigor with which the Government has sought to justify the existence of common law and non-statutory remedies reflects a lack of confidence in the soundness of the decision below. That Court, with § 10 (Section 403) of the Rivers and Harbors Act as the basis, granted the relief which the Government sought. If its conclusion is sound, then these bolstering efforts, which occupy approximately one-third of the Government's brief, would seem to be unnecessary.

The Government's reliance upon the English experience and decisions (Resp. Br. pp. 41, 42) is unwarranted. In England, as distinguished from the United States, local harbor boards, canal companies and conservancy authorities, have title to the beds of navigable waters within their boundaries and are self-sustaining corporations. Each is charged with numerous duties performed in this country by both federal and local agencies, such as dredging, supplying aids to navigation, furnishing dock and pier facilities, and fixing charges for docking, etc. See, for example, Port of London, (Consolidation) Act, 1920, 10 and 11 Geo. 5 c. cl. XXIII, and Harbours, Docks and Pier Clauses Act 1847, 10 and 11 Vict. c. 27. One whose vessel sinks within such a harbor or river is made personally liable, by statute, for the removal expenses. He or any tortfeasor may also be liable to the corporation for damages it sustains in its proprietary capacity. The gravamen of the corporation's action for damages is common law negligence. In the instant case, as we have discussed earlier, there is no such proprietary interest.

England has followed the path of local control, and the law of Canada has developed along the same line. *White Star S. S. Co. v. North British & Merc. Ins. Co.*, 48 F. Supp. 808, 814 (D.C. Mich. 1943). American policy, on

the other hand, has favored free navigation maintained at federal expense pursuant to the commerce power in the Constitution. This policy was reflected, for example, in the Rivers and Harbors Appropriation Act of 1882, 22 Stat. 209, which provided that no tolls or operating charges should be levied upon any vessel or other watercraft passing through any canal or other improvement of navigation.

Nowhere is the basic difference between the law of the United States and that of England more pointedly illustrated than in *The Ella*, (1915) p. 111, and *The Manhattan*, 10 F. Supp. 45 (E. D. Pa., 1935), aff'd 85 F. 2d 427 (3rd Cir. 1936), which reached opposite results on similar facts. A good example of the radical difference between English and American wreck law is *The Crystal* (1894) A.C. 508, (cited by the Respondent at pages 23 and 42) in which the House of Lords held that under the general Act of 1847 a Harbor Authority can recover removal expenses from a non-negligent vessel owner.

The principal English case relied upon by the Government is *Dee Conservancy Board v. McConnell*, [1928] 2 K.B. 159 (C.A.). (Resp. Br. pp. 24, 42). The basic difference in the two systems of law makes it and the other English citations clearly distinguishable. In the above case, the Court pointed out that the Conservancy Board was "the owner of the soil with the right to take tolls for navigation and the duty to keep navigation open. * * *" 2 K.B. 166.

The Wreck Statute of the United States contains all of the remedies available to the Government in this litigation. Remedies accorded elsewhere are not relevant.

CONCLUSION

For the reasons set forth in petitioners' original brief and this reply brief it is submitted that the decision of the

Court of Appeals is wrong and the judgment of the District Court in favor of the petitioners should be reinstated.

Respectfully submitted,

LUCIAN Y. RAY,
WILLIAM D. CARLE, III of
McCREARY, HINSLEA & RAY,
1550 Union Commerce Building,
Cleveland, Ohio,

and

BENJAMIN W. YANCEY,
ALFRED M. FARRELL, JR. of
TERRIBERRY, RAULT, CARROLL,
YANCEY & FARRELL,
2141 International Trade Mart
Building,
New Orleans, Louisiana,
*Attorneys for Wyandotte
Transportation Company.*

GEORGE B. MATTHEWS of
LEMLE & KELLEHER,
1836 National Bank of Commerce
Building,
New Orleans, Louisiana,
*Attorneys for Union Barge
Line Corporation.*

TOM F. PHILLIPS of
TAYLOR, PORTER, BROOKS,
FULLER & PHILLIPS,
Louisiana National Bank Building,
Baton Rouge 1, Louisiana,
and

J. BARBEE WINSTON,
GERARD T. GELPI of
PHELPS, DUNBAR, MARKS,
CLAVERIE & SIMS,
Hibernia Bank Building,
New Orleans, Louisiana,
Attorneys for Cargill, Inc., et al.

PROOF OF SERVICE

I, George B. Matthews, one of the attorneys for petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of October _____, 1967, I served copies of the foregoing Brief on respondent United States of America by mailing a printed, bound copy thereof in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

GEORGE B. MATTHEWS,
Counsel for Union Barge Line
Corporation,
1836 National Bank of Commerce
Building,
New Orleans, Louisiana.

SUPREME COURT OF THE UNITED STATES

No. 31.—OCTOBER TERM, 1967.

Wyandotte Transportation Company et al., Petitioners, v. United States.	} On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
-------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------

[December 4, 1967.]

MR. JUSTICE FORTAS delivered the opinion of the Court.

Two cases, raising related issues, are here involved. In *United States v. Cargill* the Government asked that parties responsible for the allegedly negligent sinking of a vessel in an inland waterway be declared responsible for removing the impediment to navigation thus created. In *United States v. Wyandotte Transportation Co.* the United States had itself removed a sunken vessel; claiming that the vessel had been negligently sunk, it sought reimbursement for the costs of removal. The question now before us for decision is whether the relief requested in these cases is available to the United States.

The United States District Court for the Eastern District of Louisiana concluded that such relief is not available. After the cases were consolidated, that court granted summary judgment against the United States in each instance. The court decided that the Government has no *in personam* rights against those responsible for having negligently sunk a vessel. In its view, the United States is limited to an *in rem* right against the cargo of the negligently sunk vessel and against the vessel itself. *United States v. Cargill, Inc.*, 1964 A. M. C. 1742 (1964).

2 WYANDOTTE CO. v. UNITED STATES.

The Court of Appeals for the Fifth Circuit reversed. It held that under the Rivers and Harbors Act of 1899, 30 Stat. 1151 *et seq.*, as amended, 33 U. S. C. § 401 *et seq.*, the United States may assert *in personam* rights—to injunctive or declaratory relief or damages—against those responsible for the negligent sinking of a vessel. *United States v. Cargill, Inc.*, 367 F. 2d 971 (1966). Because of a conflict among the circuits and because of the important question regarding interpretation of a statute of the United States, we granted certiorari. 386 U. S. 906 (1967). We affirm the judgment below.

The crucial facts of both cases occurred in March 1961. The Cargill libel alleges that, at that time, a supertanker bound up the Mississippi for Baton Rouge, Louisiana, collided with two barges moored by a tug. The barges were owned by petitioner Cargo Carriers, Inc.; and petitioner Jeffersonville Boat and Machine Co., respectively. The Government was notified immediately after the accident that the two barges had sunk. A few days later, it was served with notice that the barges were being abandoned. The United States refused, however, to accept abandonment or to assume responsibility for removing the wrecks. In December 1962, it brought suit against the owners, managers, charterers, and insurers of the two barges, seeking a decree that the respondents were responsible for removing the sunken vessels. The Government charged that negligence in the equipping, manning, and mooring of the barges had caused the sinking. To this date, the barges involved in this case remain in the Mississippi.

The Wyandotte libel is founded on facts more dramatic. A barge loaded with 2,200,000 pounds of liquid chlorine sank while being pushed in the Mississippi near Vidalia, Louisiana. Wyandotte, the owner of the barge, at first made some attempts to locate and raise the wreck. But then, in November 1961, Wyandotte informed the

Army Corps of Engineers that it believed further efforts to raise the barge would be unsuccessful. Wyandotte stated that it was abandoning the vessel. The Government began a study of the danger posed by such a substantial load of chlorine at the bottom of the Mississippi. It was feared that, if any chlorine escaped, it would be in the form of lethal chlorine gas, which might cause a large number of casualties. The Government demanded that Wyandotte remove the barge. Wyandotte refused to do this.¹

The United States then moved to avert a catastrophe by locating and raising the barge and its deadly cargo. In October 1962, the President proclaimed the presence of the barge to be a major disaster under the Disaster Relief Act, 42 U. S. C. § 1855-1855g. Safety precautions on a grand scale were taken, and a team of experienced divers sought gingerly to raise Wyandotte's barge. These operations, costing the United States some \$3,081,000, proved successful.

The United States demanded that the owners and operators of the barge reimburse the Government for its expenses. This demand was rejected. In January 1963, the Government brought suit, *in rem* against the barge and her cargo,² and *in personam* against the owner of the barge, the owner of the boat that had been pushing

¹ There is some dispute as to whether the United States ever agreed to remove the owner's barge. The Court of Appeals was cognizant of this issue but concluded that its resolution of the cases made a decision on this point unnecessary. We agree. We therefore do not pass on the questions whether the United States asserted the right to remove Wyandotte's barge or whether the Government, once it has asserted such a right, is precluded from seeking declaratory relief.

² Upon motion of the United States, the District Court ordered that the chlorine and its containers be sold and that the proceeds be paid into court pending final disposition of the litigation. The proceeds of this sale were \$85,000. Petitioners do not dispute the right of the United States to this sum. See n. 12, *infra*.

the barge when it sank, and the owner of the chlorine cargo.³ The libel charged these parties with negligence and fault in the design, towing, manning, mooring, and equipping of the barge. The Government sought a decree for the costs it incurred in removing the wreck.⁴

I.

Although the Government has advanced several discrete grounds for affirmance, we do not pause to examine each of them.⁵ We agree that § 15 of the Rivers and

³ On petition for rehearing, the Court of Appeals affirmed the summary judgment entered in favor of Union Carbide Co., the owner of the chlorine, on the ground that there was no allegation or proof of negligence on its part. That decision is not now before us.

⁴ Of the expenses incurred by the United States, approximately \$1,565,000 was for engineering costs; the remainder, some \$1,516,000, was for public health and safety measures, including allegedly necessary precautions against a possible rupture of the chlorine containers during salvage operations. We do not, of course, pass on the questions whether all of these expenses were necessary to remove the barge or whether the Government may recover all of them.

⁵ Thus, we intimate no view as to whether a negligently sunk vessel may be an "obstruction . . . to the navigable capacity of any of the waters of the United States," prohibited by § 10 of the Rivers and Harbors Act of 1899, 33 U. S. C. § 403. This was the ground upon which the Court of Appeals rested its decision. We do not assess any of the Court of Appeals' conclusions, nor do we decide whether petitioners may be subject to the criminal and other remedies of § 12 of the Act, 33 U. S. C. § 406, which applies to violations of § 10.

Nor, finally, do we decide whether nonstatutory public nuisance law may form a basis for the relief here sought by the Government. See, e. g., *Mayor of Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 97 (1838); *United States v. Hall*, 63 F. 472, 474 (C. A. 1st Cir. 1894); *The Ella*, 1915 P. 111 (1914); Comment, Substantive and Remedial Problems in Preventing Interferences with Navigation: The Republic Steel Case, 59 Col. L. Rev. 1065, 1067 (1959); Wisdom, Obstructions in Rivers, 115 Just. P. 846 (1955). We there-

Harbors Act of 1899, 33 U. S. C. § 409, read in light of our decision in *United States v. Republic Steel Corp.*, 362 U. S. 482 (1960), controls the issues here presented. Section 15 reads in relevant part as follows:

"It shall not be lawful . . . to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; . . . And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411-416, 418, and 502 of this title."

Petitioners do not dispute, as indeed they could not, that the negligent sinking of a vessel falls within the prohibition of the first above-quoted clause of § 15.⁶

fore do not pass either on the question whether such a nonstatutory right of the sovereign has ever existed in the United States, cf. *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 (1888); *United States v. Republic Steel Corp.*, 362 U. S. 482, 486 (1960); or on whether such a right, if it ever did exist, survived the series of enactments beginning with the Rivers and Harbors Act of 1890, 26 Stat. 426, 454, in which Congress asserted the general interest of the United States in the removal of sunken vessels obstructing navigable waters. Cf. *In re Debs*, 158 U. S. 564 (1895).

⁶ It bears emphasis that we are here concerned with the *careless* or *negligent* sinking of a vessel, which is specifically declared not

They contend, however, that the Act contains specific remedies for such a violation of § 15, and that those remedies were meant by Congress to be exclusive of all others. Petitioners point to the § 15 duty of the owner to mark and remove a sunken craft. They note that failure to remove "shall be considered as an abandonment of said craft and subject the same to removal by the United States." And petitioners call our attention to §§ 19 and 20 of the Act, 33 U. S. C. §§ 414-415, which set forth the procedure whereby the United States may remove a sunken craft that "shall be considered as" abandoned under § 15. Section 19 provides that, whenever a sunken vessel exists as an obstruction to any navigable waters of the United States for a period longer than 30 days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel "shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of the Army at his discretion, without liability for any damage to the owners of the same." That section further contemplates "that any money received from the sale of any such wreck . . . shall be covered into the Treasury of the United States." 33 U. S. C. § 414. Section 20, an emergency provision applicable only when a sunken vessel obstructs a waterway "in such manner as to stop, seriously interfere with, or specially endanger navigation," 33 U. S. C. § 415, is similar in structure to § 19.

to be lawful by the first above-quoted clause of § 15. Negligence is the sole theory of recovery in the Government's libels. Questions involving a non-negligent sinking, which is not forbidden by § 15, are not now before us and we do not mean to indicate what relief, if any, may be available to the Government in that situation.

The determination of the applicability of § 20 is left by that section to "the opinion of the Secretary of the Army, or any agent of the United States to whom the Secretary may delegate proper

Finally, petitioners emphasize that § 16 of the Act provides criminal penalties for "every person and every corporation that shall violate or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions [of § 15]." 33 U. S. C. § 415.⁸ They point out that § 12 of the Act, 33 U. S. C. § 406, which provides penalties for violations of § 10, 33 U. S. C. § 403,⁹ expressly authorizes the injunctive remedy. They argue that the lack of such an authorization in § 16 should be taken to mean that Congress did not intend the United States to be able to obtain what is, in effect, injunctive relief as a remedy for a violation of § 15.¹⁰

The position of petitioners is, therefore, that in the case of a negligently sunk vessel, the Government may require the owner to mark it; it may expect him to remove it or forfeit his interest in the vessel; if the Government proceeds to remove the vessel, it possesses the right to sell vessel and cargo and retain the proceeds of these sales.¹¹ Moreover, the Government may pro-

authority." Once the determination is made, the Secretary or his agent may "take immediate possession" of a sunken vessel "so far as to remove or to destroy it and to clear immediately" the obstructed waterway. See n. 20, *infra*.

⁸ Violation is a misdemeanor, punishable by "a fine not exceeding \$2,500 nor less than \$500 or by imprisonment [in the case of a natural person] for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court. . . ."

⁹ See n. 5, *supra*.

¹⁰ As noted, the United States sought declaratory relief in the *Cargill* action.

¹¹ The Government notes, in regard to petitioners' contention that these remedies are exclusive, that they apply only to the owner of a vessel. The Government argues that the position of those allegedly negligent petitioners who are not owners is substantially weaker. But see *United States v. Bethlehem Steel Corp.*, 319 F. 2d 512, 521 (C. A. 9th Cir. 1963). We note that the prohibition of § 15 against the negligent sinking of a vessel and the criminal

8 WYANDOTTE CO. v. UNITED STATES.

ceed criminally, under § 16, against those responsible for the negligent sinking. But, petitioners argue, the Government may do no more. Under their view, the very detail of the Rivers and Harbors Act negates the possibility that Congress intended the Government to be able to recover removal expenses exceeding the value of the vessel and its cargo. Petitioners would apply the same analysis to a government action for declaratory or injunctive relief. Indeed, petitioners believe that authorization of the injunction remedy in another, analogous, section of the Act indicates congressional intent to withhold declaratory or injunctive relief as a means of enforcing § 15.¹²

We do not agree. Petitioners' interpretation of the Rivers and Harbors Act of 1899 would ascribe to Congress an intent at variance with the purpose of that statute. Petitioners' proposal is, moreover, in disharmony with our own prior construction of the Act, with our decisions on analogous issues of statutory construction, and with a major maritime statute of the United States. If there were no other reasonable interpretation of the statute, or if petitioners could adduce some persuasive indication that their interpretation accords with the congressional intent, we might be more disposed to accept that interpretation. But our reading of the Act does not lead us to the conclusion that Congress must have intended the statutory remedies

penalties of § 16 are not limited to owners. Our disposition of these cases makes it unnecessary for us to pass on the Government's contention.

¹² Petitioners concede the *in rem* right of the United States against the negligently sunk vessel and her cargo, see Brief for Petitioners, p. 12, despite the fact that the right of the Government to proceed against cargo is by no means clearly granted by the statute. See § 19, 33 U. S. C. § 414; *United States v. Cargo Salvage Corp.*, 228 F. Supp. 145 (D. C. S. D. N. Y. 1964). See also § 16, 33 U. S. C. § 412.

and procedures to be exclusive of all others. There is no indication anywhere else—in the legislative history of the Act, in the predecessor statutes, or in nonstatutory law—that Congress might have intended that a party who negligently sinks a vessel should be shielded from personal responsibility. We therefore hold that the remedies and procedures specified by the Act for the enforcement of § 15 were not intended to be exclusive. Applying the principles of our decision in *Republic Steel*, we conclude that other remedies, including those here sought, are available to the Government.

II.

Article I, § 8, of the Constitution grants to Congress the power to regulate commerce. For the exercise of this power, the navigable waters of the United States are to be deemed the “public property of the nation and subject to all the requisite legislation by Congress.” *Gilman v. Philadelphia*, 70 U. S. 713, 725 (1865). The Federal Government is charged with ensuring that navigable waterways, like any other routes of commerce over which it has assumed control, remain free of obstruction. Cf. *In re Debs*, 158 U. S. 564, 586 (1895). The Rivers and Harbors Act of 1899, an assertion of the sovereign power of the United States, *Sanitary District v. United States*, 266 U. S. 405 (1925), was obviously intended to prevent obstructions in the Nation’s waterways. Despite some difficulties with the wording of the Act, we have consistently found its coverage to be broad. See, e. g., *Sanitary District v. United States*, *supra*; *United States v. Republic Steel Corp.*, 362 U. S. 482 (1960).¹³ And we have found that a principal beneficiary of the Act, if not the

¹³ In this conclusion we have been supported by similarly broad readings of similar statutes predating this one. See, e. g., *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690 (1899).

10 WYANDOTTE CO. v. UNITED STATES.

principal beneficiary, is the Government itself. *United States v. Republic Steel Corp.*, *supra*, at 492.

Our decisions have established, too, the general rule that the United States may sue to protect its interests. *Cotton v. United States*, 11 How. 229 (1850); *United States v. San Jacinto Tin Co.*, 125 U. S. 273 (1888); *Sanitary District v. United States*, *supra*. This rule is not necessarily inapplicable when the particular governmental interest sought to be protected is expressed in a statute carrying criminal penalties for its violation. *United States v. Republic Steel Corp.*, *supra*. Our decisions in cases involving civil actions of private parties based on the violation of a penal statute so indicate. *Texas & Pacific Ry. v. Rigsby*, 241 U. S. 33 (1916); *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964).¹⁴ In those cases we concluded that criminal liability was inadequate to ensure the full effectiveness of the statute which Congress had intended. Because the interest of the plaintiffs in those cases fell within the class that the statute was intended to protect, and because the harm that had occurred was of the type that the statute was intended to forestall, we held that civil actions were proper. That conclusion was in accordance with a general rule of the law of torts. See Restatement (Second) of Torts § 286. We see no reason to distinguish the Government, and to deprive the United States of the benefit of that rule.

The inadequacy of the criminal penalties explicitly provided by § 16 of the Rivers and Harbors Act is beyond dispute. That section contains only meager monetary penalties. In many cases, as here, the combination of these fines and the Government's *in rem* rights would not

¹⁴ See *North Bloomfield Gravel Mining Co. v. United States*, 88 F. 664, 678-679 (C. A. 9th Cir. 1898). See also *Dann v. Studebaker-Packard Corp.*, 288 F. 2d 201, 208-209 (C. A. 6th Cir. 1961); *Reitmeister v. Reitmeister*, 162 F. 2d 691, 694 (C. A. 2d Cir. 1947).

serve to reimburse the United States for removal expenses. It is true that § 16 also provides for prison terms, but this punishment is hardly a satisfactory remedy for the pecuniary injury which the negligent shipowner may inflict upon the sovereign. Cf. *United States v. Acme Process Equipment Co.*, 385 U. S. 138 (1966).

It was a similar process of reasoning that underlay our decision in *United States v. Republic Steel Corp.*, 362 U. S. 482 (1960). That case concerned the deposit of industrial solids which, we believed, created an "obstruction . . . to the navigable capacity" of a waterway of the United States, within the meaning of § 10 of the Act. We decided that the Government might seek injunctive relief to compel removal of such an obstruction, even though such relief was nowhere specifically authorized in the Act. We concluded that the authorization of injunctive relief in § 12, which is applicable only to a limited category of § 10 obstructions (structures), should not be read to exclude injunctions to compel removal of other types of § 10 obstructions. In referring to the act, we noted that "Congress has legislated and made its purpose clear; it has provided enough federal law in § 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the grand design of this legislation." 362 U. S., at 492.

Although we do not approach the instant cases in the context of § 10, we believe the principles of *Republic Steel* apply, by analogy, to the issues now before us.¹⁵

¹⁵ Petitioners would distinguish *Republic Steel* on the ground that, in that case, "if . . . injunctive relief . . . was not available, the free navigability of the channel would be seriously impaired and Republic Steel Corp., by repeatedly paying the fine imposed [by § 12], would, in effect, be operating under a license." See Brief for Petitioners, p. 29; *United States v. Bethlehem Steel Corp.*, 319 F. 2d 512, 518 (C. A. 9th Cir. 1963). This ground of distinction will

The Government may, in our view, seek an order that a negligent party is responsible for rectifying the wrong done to maritime commerce by a § 15 violation. Denial of such a remedy to the United States would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim. It might in some cases permit the negligent party to benefit from commission of a criminal act. We do not believe that Congress intended to withhold from the Government a remedy that ensures the full effectiveness of the Act. We think we correctly divine the congressional intent in inferring the availability of that remedy from the prohibition of § 15.

It is but a small step from declaratory relief to a civil action for the Government's expenses incurred in removing a negligently sunk vessel. See *United States v. Perma Paving Co.*, 332 F. 2d 754 (C. A. 2d Cir. 1964). Having properly chosen to remove such a vessel, the United States should not lose the right to place responsibility for removal upon those who negligently sank the vessel. See Restatement of Restitution § 115; *United States v. Moran Towing & Transportation Co.*, 374 F. 2d

not do, for at least three reasons. First, the criminal provisions of § 12 include not only a fine but a prison term. See *United States v. Bethlehem Steel Corp.*, 319 F. 2d 512, 523 (C. A. 9th Cir. 1963) (dissenting opinion). Second, if fines were in practice the only deterrent in § 12 and § 16, it might well be worthwhile to risk fines rather than take necessary safety measures for tows. Third, the proposed ground of distinction concentrates upon the injunction in *Republic Steel* against future violations of the Act; it does not explain the mandatory injunction in that case to compel removal of the obstruction that had already been created at the time of the Government's suit.

Indeed, the argument for exclusivity was stronger in *Republic Steel* than it is here. In that case, we decided that injunctive relief was a proper enforcement measure against a violation of the very section to which § 12 (but not the statutory provision of injunctive process) applies.

657, 667 (C. A. 4th Cir. 1967). No issue regarding the propriety of the Government's removal of Wyandotte's barge is now raised. Indeed, the facts surrounding that sinking constitute a classic case in which rapid removal by someone was essential. Wyandotte was unwilling to effectuate removal itself. It would be surprising if Congress intended that, in such a situation, the Government's commendable performance of Wyandotte's duty must be at Government expense. Indeed, in any case in which the Act provides a right of removal in the United States, the exercise of that right should not relieve negligent parties of the responsibility for removal. Otherwise, the Government would be subject to a financial penalty for the correct performance of its duty to prevent impediments in inland waterways. See *United States v. Perma Paving Co.*, *supra*, at 758.¹⁶

We note, moreover, that under the Limitation of Vessel Owner's Liability Act of 1851, 9 Stat. 635, as amended, 46 U. S. C. § 181 *et seq.*, the liability of a shipowner "for any loss, damage, or injury by collision or for any act, matter, or thing, loss, damage, or forfeiture" may be limited to "the interest of such owner in such vessel, and her freight then pending"; but this limitation is available only if the act or damage occurred "without the privity or knowledge of such owner." "For his own fault, neglect and contracts the owner remains liable." *American Car & Foundry Co. v. Brassert*, 289 U. S. 261, 264 (1933). The reading that petitioners

¹⁶ Wyandotte, noting that government funds spent in removal operations were provided under the Disaster Relief Act, 42 U. S. C. §§ 1855-1855g, argues that nothing in that Act authorizes the United States to recover disaster relief expenditures from private parties. We agree, but the argument misses the point. We believe the United States may recover its expenses under the Rivers and Harbors Act of 1899. We see nothing in the Disaster Relief Act to the contrary.

would place on the Rivers and Harbors Act of 1899 would create an additional right of limitation, applicable in the special case of a sinking even though the owner is himself negligent. Yet Congress gave no indication, in passing the Rivers and Harbors Act, that it intended to alter or qualify the 1851 Act.¹⁷ In the congressional failure to connect these two statutes, we find at least some evidence that petitioners' discovery of a limitation of liability in the Rivers and Harbors Act is unwarranted.¹⁸

III.

Petitioners contend that, despite our prior decisions and the silence of the Rivers and Harbors Act on this point, that statute authorizes them simply to abandon their negligently sunk vessels, without further responsibility for those vessels. We find in the Act no support for such an absolute right of abandonment. The provision upon which petitioners place most reliance, the final clause of § 15, creates a "duty of the owner of . . . [a] sunken craft to commence the immediate removal of the same, and prosecute such removal diligently." Because

¹⁷ We do not, of course, pass on the applicability of the Limitation Act, before or after passage of the Rivers and Harbors Act, to the facts of the cases now before us. We only note that the principle for which petitioners are contending is very like the principle of limitation of liability, known to the statutory maritime law of the United States almost 50 years prior to passage of the Rivers and Harbors Act.

¹⁸ Petitioners' theory is, moreover, in conflict with the administrative interpretation of the statute. A regulation promulgated by the Department of the Army provides that "a person who . . . negligently permits a vessel to sink in navigable waters of the United States . . . may . . . be compelled to remove the wreck as a public nuisance or pay for its removal." 33 CFR § 209.410. The origins of this regulation go back to 1901. Letter from William Cary Sanger, Acting Secretary of War, to William L. Hughes, July 31, 1901. See *United States v. Republic Steel Corp.*, 362 U. S. 482, 490, n. 5 (1960).

"failure to do so shall be considered as an abandonment of such craft and subject the same to removal by the United States as provided for in sections [19 and 20]," petitioners contend that such failure in no case has other consequences. But the duty and remedy of the final clause of § 15 and §§ 19 and 20 are not prescribed only for owners of negligently sunk vessels. Those provisions apply "whenever a vessel . . . is wrecked and sunk in a navigable channel, accidentally or otherwise . . ." Unlike a negligent sinking, a non-negligent sinking is not declared by the Act to be unlawful. It seems highly unlikely that Congress, having specified that only a negligent or intentional sinking is a crime, would then employ such indirect language to grant the culpable owner a personal civil immunity from the consequences of that crime.

We believe the sections noted by petitioners are intended to protect the United States against liability for removing a sunken vessel if it chooses to do so. See *Zubik v. United States*, 190 F. 2d 278 (C. A. 3d Cir. 1951); *Gulf Coast Transportation Co. v. Ruddock-Orleans Cypress Co.*, 17 F. 2d 858 (D. C. E. D. La. 1927). Section 19 speaks explicitly of the discretion of the Secretary of the Army to break up, remove, sell, or otherwise dispose of a sunken vessel that has obstructed a waterway "without liability for any damage to the owners of the same." These sections do not negate the rights of the United States to obtain declaratory relief or to recover removal expenses. It is true that a proviso to § 19 states "that any money received from the sale of any such wreck . . . shall be covered into the Treasury of the United States." But that proviso does not indicate that the United States, having chosen to remove a sunken vessel, shall receive no other monies. At most, the proviso establishes the proposition that, if the United States chooses to sell a wreck, the owner of the vessel has no

right to any monies received.¹⁹ Section 20, the emergency section, closely parallels § 19.² It adds nothing to petitioners' argument.²⁰

Petitioners also claim that a substantial body of non-statutory law establishes the rule that a shipowner who has negligently sunk a vessel may abandon it and be insulated from all but *in rem* liability.²¹ They argue

¹⁹ This rule is not unfair. See 41 Tulane L. Rev. 459, 464, n. 29 (1967). The shipowner should know the value of his vessel and cargo. If he believes that value is greater than the cost of removal, he may, within 30 days after the obstruction is created, raise the vessel himself. See § 19, 33 U. S. C. § 414.

²⁰ Thus, § 20 concludes with the proviso "that the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States." Petitioners rely heavily on the phrase "shall be a charge against the craft and cargo." But that phrase does not lead to the conclusion that the Government possesses no other right to recover. The phrase merely describes the lien interest of the United States. See *United States v. Moran Towing & Transportation Co.*, 374 F. 2d 656, 671 (C. A. 4th Cir. 1962) (dissenting opinion). Such a provision is necessary in a § 20 case because, under the terms of that section, the owner is not given a statutory period in which to decide whether the value of his vessel and cargo exceeds the cost of removal and to effectuate removal himself.

²¹ Petitioners do not appear to claim that the legislative history of the Rivers and Harbors Act of 1899 clearly indicates the intent of Congress to create or codify this rule. To the extent that any intent appears in the legislative history of the 1899 Act, it is the intent not to alter pre-existing statutory law. Thus, the House conferees said of the statute that it was a "codification of existing laws pertaining to rivers and harbors, though containing no essential changes in the existing law." 32 Cong. Rec., Pt. 3, 2923 (1899); see *United States v. Republic Steel Corp.*, 362 U. S., at 486. The legislative history of prior statutes is scant. And the prior Acts themselves

that Congress must have intended to codify this rule in the Rivers and Harbors Act. We do not accept petitioners' claim. Although several modern courts have assumed the existence of such a common-law rule, see, e. g., *United States v. Moran Towing & Transportation Co., Inc.*, 374 F. 2d 656, 667; (C. A. 4th Cir. 1967) *United States v. Bethlehem Steel Corp.*, 319 F. 2d 512, 518-519 (C. A. 9th Cir. 1963) the rule evaporates upon close analysis.²² We do not believe Congress intended the Rivers and Harbors Act to embody this illusory nonstatutory law.

lend no support to petitioners. See Rivers and Harbors Act of 1880, 21 Stat. 180; Rivers and Harbors Act of 1882, 22 Stat. 191; Rivers and Harbors Act of 1890, 26 Stat. 426.

²² The American decisions speaking of a nonstatutory right of abandonment all trace back to a dictum in *Winpenny & Chedester v. Philadelphia*, 65 Pa. 135 (1870). See, e. g., *The Manhattan*, 10 F. Supp. 45 (D. C. E. D. Pa. 1935); *Gulf Coast Transportation Co. v. Ruddock-Orleans Cypress Co.*, 17 F. 2d 858 (D. C. E. D. La. 1927). In *Winpenny* the Pennsylvania Supreme Court stated in dictum that the "owner [of a sunken vessel] is absolutely not liable to raise or remove the hulk." 65 Pa., at 138. For this proposition, the Pennsylvania court cited three treatises and five English cases. The cases are not good authority. The only one close to the point, *King v. Watts*, 2 Esp. 675, 170 Eng. Rep. 493 (1898), held that an indictment for having sunk a vessel in the Thames could not be maintained because the owner had not been negligent and "it would be adding to the calamity to subject the party to an indictment . . . against which he could not guard, or which he could not prevent." Of the two treatises cited, one, *Shearman & Redfield on Negligence* (3d ed. 1869), states that "it is well settled that the owner of a vessel which has been sunk in navigable waters, and abandoned by him is under no obligation to remove the vessel . . ." But the only case cited for this "well-settled" rule is *King v. Watts*.

Moreover, it seems clear that the *Winpenny* court was not speaking of the "rule" that petitioners propose. That court, after the above quoted passage, went on as follows:

"There seem to be good reasons for this rule. When a vessel is lost by the act of God, or by accident, the owner suffers oftentimes great damage, and when she becomes a total loss, it seems to

IV.

These cases were decided in the District Court on petitioners' motion for summary judgment. The Court of Appeals reversed and remanded for further proceedings. As we have noted, the Government's libels were based on a theory of negligence, and the award of the Court of Appeals called for a determination whether the acts of the various petitioners constituted negligence. We agree with that disposition.

Affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

be a great hardship to add to his misfortune the duty of removing the wreck. It would discourage commerce to hold him to so severe a duty; for who would engage in trade, if, when he has lost his vessel, he might be forced to incur an expense of more than her original cost in removing the wreck from some difficult position? If compelled by the accident to abandon his property, the duty of removal should rather fall on the public, who are interested in the navigation, than on him."

Cases cited for petitioners that do not rely on *Winpenny* either do not support petitioners' claim of a nonstatutory rule, see, e. g., *In re Highland Navigation Corp.*, 24 F. 2d 582 (D. C. S. D. N. Y. 1927), affirmed, 29 F. 2d 37 (C. A. 2d Cir. 1928); *Zubik v. United States*, 190 F. 2d 278 (C. A. 2d Cir. 1951); *United States v. Bridgeport Towing Line, Inc.*, 15 F. 2d 240 (D. C. D. Conn. 1926), or support it only with unsupported dicta of their own, see, e. g., *Barracrough v. Brown* 1897 (A. C.) 615 (construing the Aire and Calder Navigation Act, 1899 (52 & 53 Vict. c. xxxii)).

SUPREME COURT OF THE UNITED STATES

No. 31.—OCTOBER TERM, 1967.

Wyandotte Transportation
Company et al.,
Petitioners,
v.
United States.

On Writ of Certiorari to the
United States Court of
Appeals for the Fifth
Circuit.

[December 4, 1967.]

MR. JUSTICE HARLAN, concurring.

I concur in the Court's holding that under § 15 of the Rivers and Harbors Act of 1899, 33 U. S. C. § 409, the United States may recover the costs of removing a vessel negligently sunk in navigable waters from those responsible for the sinking. I further agree with the holding that the United States is entitled to the declaratory relief sought in the *Cargill* action. In affording this latter relief it is my understanding that the Court does not purport to decide whether the United States may also obtain an injunction compelling removal, but has left that question to be answered in light of a full development of the facts, and in accordance with normal standards of equity.

In reaching these conclusions, I have not been unmindful of the view stated by me in dictum in my dissenting opinion in *United States v. Republic Steel Corp.*, 362 U. S. 482, 493, to the effect that the courts are precluded from supplying relief not expressly found in the Rivers and Harbors Act. Insofar as that dictum might be taken to encompass the present case, where, contrary to my view in *Republic Steel*, I do believe that the relief afforded by this Court is fairly to be implied from the statute, candor would compel me to say that the dictum was ill-founded.

On these premises I join the opinion of the Court.